

Supreme Court, U. S.

FILED

SEP 25 1975

MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 15- **470**

PARKER SEAL COMPANY, Petitioner

- v -

PAUL CUMMINS, Respondent

**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

**PAUL A. PORTER
PATRICK F. J. MACRORY
LEONARD H. BECKER
PAUL S. RYERSON**
1229 Nineteenth Street, N.W.
Washington, D.C. 20036

and

BENNETT CLARK
1000 First Security Plaza
Lexington, Kentucky 40507

Attorneys for Petitioner

INDEX

	Page
OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2-3
CONSTITUTIONAL PROVISION, STATUTE, AND GUIDELINE INVOLVED	3-4
STATEMENT OF THE CASE	4-11
Introductory Statement	4-5
The Factual Background	5-8
The Proceedings Below	8-11
REASONS FOR GRANTING THE WRIT ...	11-24
I. The Misconstruction of The Statute And Guideline by the Court of Appeals Will Discourage Religious Accommoda- tion Of Employees.....	11-14
II. The Statute And Guideline Violate The Establishment Clause.	15-21
III. An Irreconcilable Conflict Of Views Among The Judges Of The Sixth Circuit Requires This Court's Super- visory Attention.....	22-24

INDEX (Continued)

	Page
CONCLUSION	25
APPENDIX A	1a
APPENDIX B	7a
APPENDIX C	11a
APPENDIX D	13a
APPENDIX E	59a
APPENDIX F	61a
APPENDIX G	63a

AUTHORITIES CITED

CASES:	Page
<i>Braunfeld v. Brown</i> , 366 U.S. 599 (1961)	20
<i>Committee for Public Education & Religious Liberty v. Nyquist</i> , 413 U.S. 756 (1973)	15, 16, 18, 19
<i>Dewey v. Reynolds Metals Co.</i> , 402 U.S. 689 (1971)	4
<i>Everson v. Board of Education</i> , 330 U.S. 1 (1947)	19, 21
<i>Gallagher v. Crown Kosher Super Market</i> , 366 U.S. 617 (1961)	20
<i>Gillette v. United States</i> , 401 U.S. 437 (1971)	19, 20
<i>Lemon v. Kurtzman</i> , 403 U.S. 602 (1971)	16
<i>Meek v. Pittinger</i> , 95 S. Ct. 1753 (1975)	16
<i>McDonnell Douglas Corp. v. Green</i> , 411 U.S. 792 (1973)	21
<i>McGowan v. Maryland</i> , 366 U.S. 420 (1961)	20
<i>Reid v. Memphis Publishing Co.</i> , ___F.2d___, 11 F.E.P. Cases 129 (6th Cir. Aug. 20, 1975)	22, 23, 24
<i>Riley v. Bendix Corp.</i> , 464 F.2d 1113 (5th Cir. 1972)	13

AUTHORITIES (Continued)

CASES:

Page

<i>Torcaso v. Watkins</i> , 367 U.S. 488 (1961)	19
<i>Two Guys From Harrison-Allentown, Inc. v. McGinley</i> , 366 U.S. 582 (1961)	20
<i>United States ex rel. Robinson v. Johnston</i> , 316 U.S. 649 (1942)	24

STATUTES:

28 U.S.C. § 1254(1)	2
Section 701(j) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e(j) (Supp. II, 1972)	3
Section 703(a)(1) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1)(1970)	3, 14

REGULATIONS:

29 C.F.R. § 1605.1 (1974)	4, 8, 14
---------------------------------	----------

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-_____

PARKER SEAL COMPANY, Petitioner

- v -

PAUL CUMMINS, Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Parker Seal Company, the petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered herein May 23, 1975.

OPINIONS BELOW

The opinion of the Court of Appeals (App. D, page 13a) is unreported. The opinion of the District Court (App. B, p. 7a) is unreported. The opinion of the Kentucky Commission on Human Rights (App. A, p. 1a) is unreported.

JURISDICTION

The judgment of the Court of Appeals was entered May 23, 1975 (App. E, p. 59a). A timely petition for rehearing was denied by order entered July 18, 1975 (App. F, p. 61a). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

Title VII of the 1964 Civil Rights Act, as amended, and the EEOC's "religious accommodation" guideline promulgated thereunder, require an employer to justify the discharge of an employee who refuses to perform assigned work for religious reasons, by showing that reasonable accommodation to the employee's requirements would impose undue hardship on the conduct of its business. The questions presented in this case are:

1. Whether the Court of Appeals has improperly determined that an employer which tries, unsuccessfully, to accommodate an employee who refuses to work regularly scheduled Saturdays is barred from showing that its continued efforts impose undue hardship.

2. Whether, as construed and applied by the Court of Appeals, the foregoing statute and

guideline, which require an employer to accord preferential treatment to selected employees solely on the basis of their religious beliefs, violate the Establishment Clause of the First Amendment.

3. Whether irreconcilable conflicts between varying panels of the Court below under the statute and guideline here at issue call for the exercise of this Court's supervisory jurisdiction.

CONSTITUTIONAL PROVISION, STATUTE, AND GUIDELINE INVOLVED

The Establishment Clause of the First Amendment provides: "Congress shall make no law respecting an establishment of religion. . . ."

Section 701(j) of the Civil Rights Act of 1964, as amended, provides:

"The term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business." 42 U.S.C. § 2000e(j) (Supp. II, 1972).

Section 703(a)(1) of the Civil Rights Act of 1964, as amended, provides in pertinent part:

"It shall be an unlawful employment practice for

an employer . . . to . . . discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's . . . religion. . . ." 42 U.S.C. § 2000e-2(a)(1)(1970).

Guideline 1605.1 of the United States Equal Employment Opportunity Commission provides in pertinent part:

"[S]ection 703(a)(1) of the Civil Rights Act of 1964 . . . includes an obligation on the part of the employer to make reasonable accommodations to the religious needs of employees and prospective employees where such accommodations can be made without undue hardship on the conduct of the employer's business.

"[T]he employer has the burden of proving that an undue hardship renders the required accommodations to the religious needs of the employee unreasonable." 29 C.F.R. § 1605.1 (1974).

STATEMENT OF THE CASE

Introductory Statement. This case presents the Court with the opportunity to consider the EEOC "religious accommodation" guideline, which was last here at the 1970 October Term in *Dewey v. Reynolds Metals Co.*, 402 U.S. 689 (1971), *aff'd* by an equally divided Court 429 F.2d 324 (6th Cir. 1970).

The Court of Appeals has adjudged the petitioner in the instant case, Parker Seal Company, guilty of religious discrimination in employment.¹ The record shows that after a year-long effort at accommodation, Parker discharged Paul Cummins, a plant supervisor who refused to work on Saturdays despite the company's demonstrated need for his services on that day. Following a full evidentiary hearing, the Kentucky Commission on Human Rights ruled that Parker had made a reasonable effort to accommodate its employee's religious beliefs. The United States District Court for the Eastern District of Kentucky reached the same judgment. But the Court of Appeals (per Phillips, C.J.) reversed because, in its view, Parker had failed to demonstrate that retention of Cummins would engender "chaotic personnel problems" or have other "dire effect" upon Parker's business. One judge (Celebrezze, J.) dissented on the ground that, as interpreted by the majority, the applicable federal statute and guideline violated the Establishment Clause of the First Amendment.

The Factual Background. Cummins was hired by Parker in 1958 at its rubber seal factory in Berea, Kentucky. In 1965 he became supervisor of the first shift in the Banbury department of the plant. One requirement of that position was that the

1. Parker Seal Company is the Kentucky trade name of Parker Corporation, formerly the Parker-Hannifin Corporation.

supervisor be present when the first shift was operating the Banbury department, including Saturdays. The Banbury department frequently operated on Saturdays, and for five years Cummins had no objection to working on that day. However, in July 1970, after becoming a member of the World Wide Church of God, which forbids work between sundown on Friday and sundown on Saturday, he suddenly refused to work on Saturdays.

Parker took no action against Cummins.² Instead, for fourteen months the company attempted to accommodate his religious views by assigning supervisors from the neighboring department to cover the Banbury department on the first Saturday shift. Generally this involved one supervisor's covering both departments at the same time, although the plant manager regarded this as "absolutely not" good operating procedure. If the neighboring department was not working, the substitute supervisor came to work exclusively to cover the Banbury department.

During the summer of 1971, as the result of substantial overtime, the other supervisors were working 72 hours a week. Cummins, however, was

2. According to Cummins, the plant manager told him "as long as it don't cause any problems I have no objections to you observing the Sabbath" (Tr. 54). ("Tr." refers to the transcript of proceedings before the Kentucky Commission on Human Rights.)

working only 40 hours a week, although he and his colleagues, as supervisors, were all paid a set salary without regard to the number of hours worked.³ The other supervisors began to complain.

During this period Parker's plant in Berea had shown declining profits, and a large layoff of the work force had taken place. The new plant manager, who was brought in in November 1970, realized that there were serious economic and supervisory problems which had to be solved if the plant was not to be closed.

In particular, the plant manager concluded that Cummins' presence in the Banbury department was required on Saturdays. As he testified,

"[Cummins'] religion . . . didn't bother me at that time, one way or the other. The fact that he could not work Saturday did. We run a plant that operates six (6) days a week a good percentage of the time. Paul, in a responsible position, running a department, *had to be there if that department was to function the way it should*" (Tr. 173) (emphasis supplied).

In September 1971, the plant manager requested Cummins to reconsider his position on Saturday work. Cummins refused. Thereafter, he was

3. Indeed, as a result of seniority, Cummins received more pay than his colleagues.

discharged.⁴ He was fired because he would not work Saturdays.

The Proceedings Below. Upon his discharge, Cummins filed grievances against Parker with both the Kentucky Commission on Human Rights (the "KCHR") and the United States Equal Employment Opportunity Commission (the "EEOC"). After a full evidentiary hearing before a plenary session of the KCHR, that body dismissed Cummins' complaint. The State Commission found that during the period in which Parker permitted Cummins to take Saturdays off, "all [other] supervisory personnel . . . were required to work all hours and days of scheduled regular and scheduled overtime work in their respective departments on their respective shifts"; also, that "Cummins refused to report for scheduled hours and days of regular and overtime work on his shift in his department but lost no wages or benefits as the result of his refusal to work for religious reasons" (App. A, pp. 3a-4a). The Commission, applying Kentucky law which embodied essentially verbatim the federal Civil Rights Act of 1964 and the EEOC Guideline 1605.1, concluded that Parker could not "accommodate [Cummins'] . . . religious needs without placing an undue hardship on the conduct of [its] business" (App. A, p. 6a).

4. Transfer to a lower grade was barred by Parker's collective bargaining agreement with the union.

Thereupon, following the EEOC's issuance of a "right to sue" letter, Cummins brought the present action against Parker in the United States District Court for the Eastern District of Kentucky. The parties stipulated to the record before the KCHR. On that record, the District Court agreed with the KCHR that Parker had

"made a reasonable accommodation to the plaintiff's religious needs and that no further accommodation could be made at the time of the [plaintiff's] . . . dismissal from employment without creating an undue hardship on the employer's business.

"The defendant was therefore justified in discharging the plaintiff" (App. B, pp. 8a-9a).

On appeal, the Court of Appeals for the Sixth Circuit reversed, one judge dissenting. For the two-judge majority, Chief Judge Phillips concluded that under both the applicable EEOC Guideline and the Civil Rights Act of 1964, as amended, Parker had failed to demonstrate "chaotic personnel problems," or any other "dire effect upon the operation of its business" (App. D, p. 29a). The Court suggested that Parker "could have required Appellant to work . . . on Sundays" — even though the plant rarely operated on Sundays, and in any event Cummins was already present on any Sunday

that his department functioned.⁵ Alternatively, the Court said, Parker "could have reduced Appellant's salary commensurately with his shorter work week" — thereby cutting his pay almost in half (App. D, p. 29a). Finally, the Court taxed Parker for its one-year effort at accommodation, professing inability to understand "why an accommodation that was reasonable for over a year . . . suddenly became unreasonable in September 1971" (App. D, p. 20a).

Similarly, the Court of Appeals rejected Parker's constitutional argument that as construed and applied, the applicable provisions of the Civil Rights Act and EEOC Guideline violated the Establishment Clause of the First Amendment. The Court conceded that "some religious institutions will derive incidental benefits" from the guideline and statute (App. D, p. 36a). But it discounted the expressed view of the author of the statute that it was designed to counteract the "dwindling of the membership of some . . . religious organizations" (remarks of Sen. Randolph); that argument by one Senator, the Court observed, did "not require the conclusion that Congress enacted the legislation to promote and support *a particular religion*" (App. D, p. 37a) (emphasis supplied). Rather, the Court concluded, the statute and regulation could be

5. See, e.g., Tr. 48, 128, 194.

salvaged because they "are applicable to *all* members of *all* religious faiths who observe Saturday as the Sabbath" (App. D, p. 37a) (emphasis in original). The Court professed to see no violation of the Establishment Clause in this acknowledged federal legislative aid to Sabbatarian religious activity.

Judge Celebrezze dissented. In his view, the statute and guideline had both the purpose and primary effect of promoting and advancing particular religious sects, and therefore violated the Establishment Clause.

REASONS FOR GRANTING THE WRIT

I. THE MISCONSTRUCTION OF THE STATUTE AND GUIDELINE BY THE COURT OF APPEALS WILL DISCOURAGE RELIGIOUS ACCOMMODATION OF EMPLOYEES.

Far from enhancing protection for employees, the Court of Appeals' decision will deter employers from attempting to accommodate the religious needs of their employees for fear that, once having done so, they will be estopped from asserting that their efforts caused them "undue hardship." Having all but written the "reasonable accommodation" rule out of the applicable law, the Court has created

ongoing problems in the administration of an important federal statutory scheme.⁶

Parker accommodated Cummins for more than a year after he announced he would no longer work on Saturdays. Although Cummins' shift in the Banbury department frequently had to operate on Saturdays, he was excused from Saturday work from July 1970 to September 1971, and alternative, makeshift arrangements were made for the necessary supervision. Eventually, however, in view of the severe "economic . . . and supervisory . . . problems" faced by the plant, the plant manager concluded that those arrangements could not continue (Tr. 166). In his words, Cummins "had to be there [on Saturdays] if that department was to function the way it should" (App. D, p. 26a).

The Court of Appeals turned this evidence of attempted accommodation against Parker. The Court rested its decision largely on its professed inability to understand "why an accommodation that was reasonable for over a year . . . suddenly became unreasonable in September 1971" (App. D, p. 20a).

6. Although the 1972 statutory amendment was not in force at the time of Cummins' dismissal, the Court below treated it as simply ratifying the EEOC Guideline, and hence as governing the present case.

In other words, once having embarked on an effort to determine whether Cummins' duties could be adequately discharged without Saturday work, Parker effectively estopped itself from thereafter ever asserting that its efforts ultimately caused it "undue hardship."

The Court of Appeals has supplanted its own views for the plant manager's considered judgment, based on months of experience, that Saturday work was an essential part of the Banbury first shift supervisor's job. Indeed, the Court's conclusion that Cummins' supervisory presence was not required on Saturdays flies in the face of common sense, which tells us that the functions of a supervisor are not those of a mere timekeeper. In a relatively sophisticated manufacturing process, the availability of a full-time supervisor, as a matter of efficient plant management, is indispensable to avoid unnecessary delays or interruptions to the production process.

The Court of Appeals' opinion places the employer in an intolerable position. If he refuses to make any effort to accommodate his Sabbatarian employees, he risks immediate liability under the statute and guideline.⁷ But if, like Parker, he makes

7. *Riley v. Bendix Corp.*, 464 F.2d 1113 (5th Cir. 1972).

an attempt at accommodation which ultimately proves unworkable, the attempt itself will be used against him, as evidence that his claim of "undue hardship" is unfounded. Such a result surely was not intended by the EEOC when it promulgated Guideline 1605.1, nor by Congress when it passed the 1972 amendment to Title VII. Moreover, by discouraging employers from attempting to work out problems arising from employees' religious convictions, the decision below frustrates the purpose of the "religious accommodation" rule.⁸

8. The unrealistic approach of the Court of Appeals is further demonstrated by its suggestion that, to alleviate the difficulties caused by Cummins' refusal to work on Saturdays, he might have been required to work on Sundays (App. D, p. 29a). Parker's Berea plant rarely operated on Sundays (Tr. 194), and whenever it did, according to Cummins, he was already there (Tr. 48). It is difficult to see what benefit either the company or Cummins would have derived from his supervision of a deserted department on the Sundays that the plant did not operate.

The majority also suggested that Cummins' compensation could have been reduced commensurately with his shorter work week; the Court did not explain how, on its view of Parker's obligation to Cummins, a nearly 50% cut in pay could be reconciled with Title VII's prohibition against discrimination in compensation (App. D, p. 29a).

II. THE STATUTE AND GUIDELINE VIOLATE THE ESTABLISHMENT CLAUSE.

The First Amendment requires the Government "to maintain an attitude of 'neutrality', neither 'advancing' nor 'inhibiting' religion." *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756, 788 (1973). As applied and interpreted by the Court below, the statute and guideline here at issue violate that principle — they require private employers to accord preferential treatment to selected employees, even at the sacrifice of legitimate business interests, *solely* on account of those particular employees' religious beliefs. In the words of Judge Celebrezze, dissenting:

"The Regulation and Section 2000e(j) grant preferences to employees by reason of their religion, forcing modifications in seniority systems, overtime scheduling, and other forms of employee organization. An employee is exempted from work on Saturdays if he demands release for religious purposes, but other employees are not accorded the same treatment if they prefer not to work on Saturdays. Not only are the latter employees not exempted, but they may have to substitute for the absent religious practitioner on Saturdays or lose their jobs." (App. D, pp. 42a-43a).

The 1972 statutory amendment and the EEOC guideline violate at least the first two branches of the three-part test promulgated by this Court for determining whether legislation comports with the Establishment Clause. *E.g.*, *Meek v. Pittinger*, 95 S. Ct. 1753, 1760 (1975); *Committee for Public Education & Religious Liberty v. Nyquist*, *supra*, 413 U.S., at 773, 783 n.39; *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).⁹

First, the statute and guideline lack a primary "secular legislative purpose." The Court of Appeals thought that it could detect such a purpose in a supposed legislative wish "to put teeth in the existing prohibition of religious discrimination" (App. D, p. 33a). But that conclusion lacks foundation. The brief legislative history of the 1972 amendment contains no suggestion that the existing prohibition in Title VII of the 1964 Civil Rights Act was inadequate or, indeed, that religious discrimination in employment was a problem requiring remedial legislation.¹⁰

9. It is thus unnecessary to consider whether the statute and guideline violate the third branch as well. *See*, however, Celebrezze, J., dissenting below (App. D, pp. 53a-54a).

10. There was at best sparse evidence of religious (as opposed to racial) discrimination before Congress when it

(Continued on page 17).

Instead, the purpose of the 1972 amendment, as explained by its sponsor, Senator Randolph, was to stem the "dwindling of the membership of some of the religious organizations" which prohibit Saturday labor. 118 Cong. Rec. 705 (1972).¹¹ Senator Randolph did not suggest that employers were refusing to hire individuals because of their association with such organizations. Rather, he said, there was "a possible inability of employers on some occasions to adjust work schedules to fit the

(Continued from page 16).

passed the 1964 Civil Rights Act. According to Congressman Celler, Chairman of the House Judiciary Committee:

"We did not have very much testimony of discrimination on the grounds of religion. You will notice in one of the titles, religion is left out. . . .

"We had very little evidence — I do not think we had any of it insofar as the Committee on the Judiciary is concerned that any particular sect or religion had been discriminated against." 110 Cong. Rec. 1528-29 (1964).

11. Senator Randolph specifically mentioned the Orthodox Jews, the Seventh-day Adventists, and the denomination to which he himself belonged, the Seventh-day Baptists. In this connection he stated:

"My own pastor in this area, Rev. Delmer Van Horn, has expressed his concern and distress that there are certain faiths that are having a very difficult time, especially with the younger people. . . ." 118 Cong. Rec. 705 (1972).

requirements of the faith of some of their workers." *Ibid.*

In short, the 1972 amendment and the EEOC regulation from which it was derived were designed precisely to benefit members of particular religious groups whose practices conflicted with employers' normal work schedules. The primary statutory purpose of fostering religion is thus not open to doubt.

Second, the statute and guideline have the "direct and immediate effect" of advancing religion. See *Committee for Public Education & Religious Liberty v. Nyquist*, *supra*, 413 U.S., at 783 n.39. The law requires employers to discriminate *in favor* of individual employees on the basis of their religious beliefs. It thus cannot be said to have a "primary effect" of *inhibiting* religious discrimination in employment, as the Court below thought (App. D, p. 37a).

Indeed, the Court of Appeals conceded that certain religious institutions would benefit from the statute, in that, for example, "churches holding services on Saturdays may enjoy a somewhat larger attendance with a correspondingly fuller collection plate" (App. D, p. 36a). The Court of Appeals concluded, however, that the law did not run afoul of the Establishment Clause, because the statute

was not enacted to promote "a particular religion"; rather, the Court said, the law is applicable to "all members of *all* religious faiths who observe Saturday as the Sabbath" (App. D, p. 37a) (emphasis in original). But all laws which "advance religion" are void, no matter whether they "aid one religion, aid all religions, or prefer one religion over another." *Everson v. Board of Education*, 330 U.S. 1, 15 (1947). Accord: *Committee for Public Education & Religious Liberty v. Nyquist*, *supra*, 413 U.S., at 771-72 (1973); *Torcaso v. Watkins*, 367 U.S. 488, 495 (1961).

Because the 1972 amendment requires private employers to discriminate among their employees solely on the basis of their religious beliefs, the law cannot be said to be either "evenhanded in operation" or "neutral in primary impact." *Gillette v. United States*, 401 U.S. 437, 450 (1971). Employees who claim exemption from Saturday work on the ground of religious belief must be accommodated, in distinction to those who belong to religious groups which do not oppose Saturday work or who have no religious affiliation at all.

The Court below claimed to find support for its position in this Court's decision in *Gillette v. United States*, *supra*. That reliance was badly misplaced. *Gillette* was a criminal prosecution for refusal to submit to induction. This Court rejected a challenge under the First Amendment to the exemption

available to persons conscientiously opposed to participation in war in any form. The Court of Appeals here thought that, like the conscientious objector exemption in *Gillette*, "the reasonable accommodation rule reflects a legislative judgment that, as a practical matter, certain persons will not compromise their religious convictions and that *they should not be punished* for the supremacy of conscience" (App. D, p. 35a) (emphasis supplied). But Cummins was not subjected to criminal prosecution for refusing to work on Saturdays. He, and others who for religious reasons do not wish to work on particular days, are not "faced with as serious a choice as forsaking their religious practices or subjecting themselves to criminal prosecution." *Braunfeld v. Brown*, 366 U.S. 599, 605 (1961).

The *Braunfeld* decision, along with other Sunday-closing cases decided by this Court,¹² was also invoked by the Court below. But those decisions are altogether different. They rested on the conclusion that although the state Sunday-closing statutes had religious origins, their present overriding purpose and effect are largely secular — to set aside a uniform day of rest and recreation. As

12. *McGowan v. Maryland*, 366 U.S. 420 (1961); *Two Guys from Harrison-Allentown, Inc. v. McGinley*, 366 U.S. 582 (1961); *Gallagher v. Crown Koshers Super Market*, 366 U.S. 617 (1961).

shown above, the "religious accommodation" rule here at issue has no such overriding secular purpose or effect.

Under the Constitution, Congress undoubtedly has the power to require an employer to treat all his employees equally, regardless of their religious beliefs. An employee fired for failure to work on Saturdays when other, similarly placed employees were not required to work on Saturdays, might validly claim discrimination on the basis of his religion. *Cf. McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804 (1973). But the religious accommodation rule, as construed by the Court of Appeals, goes far beyond this; it demands that certain employees be placed in a privileged position vis-a-vis their peers, purely on the basis of religious conviction or practice.

The Religion Clauses of the First Amendment were "intended to erect 'a wall of separation between church and State'." *Everson v. Board of Education*, *supra*, 330 U.S., at 16. A statutorily mandated deference by private employers to preferred religious groups breaches that wall as effectively as would government discrimination against those particular religions.

III. AN IRRECONCILABLE CONFLICT OF VIEWS AMONG THE JUDGES OF THE SIXTH CIRCUIT REQUIRES THIS COURT'S SUPERVISORY ATTENTION.

On August 20, 1975 — barely three months after decision in this case — the Court below has reached a judgment in a Title VII religious discrimination case hopelessly at odds with the ruling for which Parker seeks review here. In *Reid v. Memphis Publishing Co.*, 11 F.E.P. Cases 129 (6th Cir. 1975) (Nos. 74-1761, -1762),¹³ the defendant newspaper declined to hire the plaintiff, who had applied for a job as a copyreader, because for religious reasons he refused to work on Saturdays. As with Cummins, the post sought by Reid required "real specialists," whose assignments involved "special skills and adaptability for the work." 11 F.E.P. Cases, at 131-32. As with Cummins, "In order for Reid to be accommodated, another copyreader . . . would have to be involuntarily assigned to take his place on every Saturday, even though the other man did not desire to work on that day." *Id.* at 132. As with Cummins, such an assignment "would create serious morale problems among the other copyreaders," because they "could believe that Reid was being given favorable treatment over them, because of his religion, and that they were being discriminated

13. A copy of the *Reid* opinion is set forth in Appendix G at page 63a.

against and were being penalized because they did not hold the same religious beliefs as Reid." *Id.* The only significant difference between this case and *Reid* is that, unlike Parker Seal Company, the defendant employer in *Reid* "made no effort whatsoever to accommodate plaintiff Reid's religious beliefs." *Id.*, at 137 (Edwards, J., dissenting) (emphasis in original).

The District Court granted judgment to Reid. The Court of Appeals reversed. It concluded that the difficulties feared — but never experienced — by Memphis Publishing amounted to "undue hardship" within the meaning of Title VII. The Court majority reached its decision without once mentioning *Cummins*, although the dissenting judge called his colleagues' attention to the precedent. 11 F.E.P. Cases, at 138 n.1.

Thus Parker, which strived for accommodation for over a year, is held to have violated the law, while Memphis Publishing, which made no effort to do so on an otherwise indistinguishable set of facts, escapes liability. With all respect, the only available ground of difference is the variant composition of the panels which have heard and decided the two cases.

The irreconcilable divergence of views among the panels of the Sixth Circuit mandates this Court's corrective action to achieve consistent administration of the statute.

Application of the principles followed by the *Reid* majority to Parker's case would compel decision for Parker here and reversal of the judgment below. Parker cannot again move for rehearing in the Court of Appeals. Thus, if this Court determines not to grant plenary review, it should vacate the Court of Appeals' judgment and remand for further proceedings, including leave to Parker to suggest the propriety of a rehearing of its cause by the Court of Appeals *en banc* in light of *Reid*. See *United States ex rel. Robinson v. Johnston*, 316 U.S. 649 (1942).

CONCLUSION

For the foregoing reasons, Parker Seal Company respectfully prays that a writ of certiorari issue to review the judgment of the Court of Appeals below upon plenary briefing and argument. Alternatively, Parker respectfully prays that this Court summarily vacate the judgment below and remand for further proceedings in light of the Court of Appeals' decision in *Reid v. Memphis Publishing Co.*, *supra*.

Respectfully submitted,

PAUL A. PORTER
PATRICK F. J. MACRORY
LEONARD H. BECKER
PAUL S. RYERSON
1229 Nineteenth Street, N.W.
Washington, D.C. 20036

and

BENNETT CLARK
1000 First Security Plaza
Lexington, Kentucky 40507

Attorneys for Petitioner

Of Counsel:

ARNOLD & PORTER
Washington, D.C.

STOLL, KEENON & PARK
1000 First Security Plaza
Lexington, Kentucky 40507

APPENDIX

APPENDIX A

**COMMONWEALTH OF KENTUCKY
BEFORE THE KENTUCKY COMMISSION ON
HUMAN RIGHTS
Complaint No. 231-E**

PAUL CUMMINS

Finding of Fact
VS: Conclusions of Law
Order

**PARKER SEAL COMPANY, DIVISION OF
PARKER-HANNIFIN CORPORATION**

This matter having come on for hearing before the Commission on March 3, 1972, both parties having announced ready for hearing, the Complainant, Paul Cummins, having appeared in person and with Commission attorney, Hon. Thomas Hogan, and the Defendant, Parker Seal Company, being represented by its attorney, Hon. Bennett Clark, and after having heard and considered all of the oral evidence and having considered the briefs and exhibits of the respective parties, the Commission makes the following findings of fact:

Findings of Fact

1. That the complainant, Paul Cummins, was employed by Parker Seal Company from December 9, 1958, until September 3, 1971.

2. That the complainant, Paul Cummins, was employed as a supervisor on the first shift in the Bandbury Department at the Berea plant of the Parker Seal Company from May, 1965, until September 3, 1971.

3. That at all pertinent times herein Paul Cummins was an exempted employee who was considered a part of management, was paid a straight salary not dependent upon the hours of work performed, and was a member of the Cost Goal incentive program.

4. That Parker Seal Company scheduled regular and overtime production work in the Bandbury Department and all other departments as required by sales order bookings.

5. That hourly paid production employees performing overtime work were required by union contract to be paid one and one-half times the regular hourly pay rate for work performed on Saturday and two times the regular hourly rate for work performed on Sunday.

6. That Parker Seal Company has uniformly enforced job qualifications for all supervisors work

scheduled regular and overtime hours and days scheduled for their respective departments and shifts as required by production demands based on sales orders.

7. That Paul Cummins worked scheduled week day work and scheduled Saturday overtime work consistently without protest at the Berea plant of Parker Seal from December 9, 1958, until July, 1970.

8. That after July, 1970, when Paul Cummins joined the World Wide Church of God, he refused to work on any Saturday or any other day of the week regarded by his church as a holy day.

9. That the religious beliefs of Paul Cummins were accommodated by Parker Seal Company between July, 1970, until September 3, 1971, by permitting him to work out his work schedule ahead of time and to not be present at the plant, Saturday or any other day regarded by his church as a holy day.

10. That during the period between July, 1970, and September 3, 1971, overtime work was scheduled approximately two times a month as required by sales order bookings.

11. That during the period between July, 1970, and September 3, 1971, all supervisory personnel, other than Paul Cummins, were required to work all hours and days of scheduled regular and scheduled

overtime work in their respective departments on their respective shifts.

12. That during the period from July, 1970, until September 3, 1971, foremen from the Stock Prep Department of the Parker Seal Berea plant were required to perform the supervisory duties of Paul Cummins on the first shift in the Bandbury Department whenever work was scheduled for the first shift Bandbury Department and Paul Cummins had absented himself from work for religious reasons.

13. That Paul Cummins refused to report for scheduled hours and days of regular and overtime work on his shift in his department but lost no wages or benefits as the result of his refusal to work for religious reasons.

14. That the accommodation of Paul Cummins' religious beliefs for the period between July, 1970, and September 3, 1971, caused complaints to be registered by Stock Prep foreman Chester Webb and Stock Prep foreman Oscar Fain who were required to assume the supervisory duties of the first shift Bandbury Department, whether or not work was scheduled for the Stock Prep Department, whenever Paul Cummins absented himself from work for religious reasons.

15. In early winter, 1970, Parker Seal was suffering a steady profit decline and the new division

general manager instructed the Berea plant manager to attempt an economic turn-around.

16. That the employment of Paul Cummins with Parker Seal Company was terminated because of his refusal to perform the duties of his job as a salaried supervisor in that he did and stated that he would regularly refuse, even if ordered, to perform work scheduled for Saturday and certain days of the year considered by his church as holy days, notwithstanding the uniformly applied company rule requiring that all supervisors perform scheduled work.

Conclusion of Law

The Commission concludes as a Matter of Law:

1. Respondent, Parker Seal Company, Division of Parker-Hannifin Corporation, is an "Employer" as defined by KRS 344.030 (1). Complainant, Paul Cummins, is an "Employee" as defined by KRS 344.030 (4). Accordingly, the Kentucky Commission on Human Rights has jurisdiction of the parties and the instant controversy under the Kentucky Civil Rights Act.

2. KRS 344.020 (1) (a) provides that a purpose of the Kentucky Civil Rights Act is to "provide for the execution within the state of the policies embodied in the Federal Civil Rights Act of 1964 (78 Stat. 241)."

APPENDIX B

The claim being asserted in this action by Paul Cummins, a former supervisory employee at the Berea, Kentucky plant of the Parker Seal Company, alleging religious discrimination was initially filed with the United States Equal Employment Opportunity Commission on September 21, 1971, (amended June 30, 1972) and with the Kentucky Commission on Human Rights (hereinafter referred to as KCHR) on September 28, 1971. Thereafter on March 3, 1972, a full evidentiary hearing on the complaint was conducted before the KCHR. At that hearing the plaintiff was represented by Mr. Thomas L. Hogan, the KCHR attorney, who is also the plaintiff's attorney in the present action. Subsequent to the evidentiary hearing, on April 12, 1972, the

KCHR rendered its Findings of Fact, Conclusions of Law, and Order dismissing Paul Cummins' complaint of religious discrimination and ruled that although the employer had an obligation to accommodate his religion the company's attempt to do so had placed an undue hardship on the conduct of Parker Seal's business.

The plaintiff failed to appeal the order of dismissal of the Kentucky Commission on Human Rights, and that order became a final order on May 12, 1972. On September 26, 1972, the plaintiff filed the present action which is identical in all respects — parties, facts, law sought to be applied and remedy sought — with the case previously tried before the Kentucky Commission on Human Rights.

It appears that the plaintiff was afforded a full and fair hearing before the Kentucky Commission on Human Rights and that Commission properly found that the defendant's attempts to accommodate itself to the plaintiff's religious needs was causing the defendant undue hardship.

This Court finds from the entire record herein that the defendant made a reasonable accommodation to the plaintiff's religious needs and that no further accommodation could be made at the time of the defendant's dismissal from employment without creating an undue hardship on the employer's business.

The defendant was therefore justified in discharging the plaintiff and a Judgment will therefore this date be entered for the defendant and dismissing the complaint herein.

The Court hereby adopts this Opinion as its Findings of Fact and Conclusions of Law herein.

This the 19th day of March, 1974.

/s/ Bernard T. Moynahan, Jr.
Chief Judge

A True Copy Attest

Davis T. McGarvey, Clerk
U.S. District Court
By /s/ Hilda F. Watkins
D. C.

APPENDIX C

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON

PAUL CUMMINS PLAINTIFF

VS JUDGMENT NO. 2432

PARKER SEAL COMPANY DEFENDANT

* * * * *

In conformity with the Memorandum Opinion
this date filed herein;

IT IS NOW THEREFORE ORDERED AND
ADJUDGED herein as follows:

(1) That the plaintiff's complaint herein be
dismissed.

(2) That Judgment be entered in favor of the
defendant herein.

(3) That the defendant's Motion for the
Allowance of an attorney's fee herein be overruled.

(4) That the defendant recover of the plaintiff
its properly taxable costs herein.

This the 19th day of March, 1974.

NOTICE IS HEREBY GIVEN OF THE
ENTRY OF THIS ORDER OR JUDGMENT
ON March 20, 1974

DAVIS T. MCGARVEY, CLERK

BY: Hilda F. Watkins D.C.

/s/ Bernard T. Moynahan, Jr.
Chief Judge

A True Copy Attest

Davis T. McGarvey, Clerk
U. S. District Court
By Hilda F. Watkins
D. C.

APPENDIX D

APPENDIX D

No. 74-1607

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PAUL CUMMINS, *Plaintiff-Appellant,*

v.

PARKER SEAL COMPANY, *Defendant-Appellee.*

APPEAL from the United States District Court
for the Eastern District of Kentucky,
Lexington Division.

Decided and Filed May 23, 1975.

Before PHILLIPS, Chief Judge, and CELEBREZZE
and McCREE, Circuit Judges.

PHILLIPS, Chief Judge, delivered the opinion of
the Court, in which McCREE, Circuit Judge joined.

CELEBREZZE, Circuit Judge, (pp. 21-31) filed a separate dissenting opinion.

PHILLIPS, Chief Judge. Appellant Paul Cummins brought this action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., alleging that he had been illegally discharged on the basis of his religion. In essence the complaint charged that Appellant's employer, Parker Seal Company, did not perform its duty under the Act to accommodate Appellant's religious practices and observances. The District Court entered judgment in favor of the Company, and this appeal followed. For the reasons stated below, we reverse and remand for further proceedings.

On December 9, 1958, Appellant was hired as a production scheduler in the Banbury Department of Appellee's Berea, Kentucky plant. In May 1965, Appellant was made supervisor of the first (7:00 a.m. to 3:00 p.m.) Banbury shift. As a supervisor, he was salaried and was obligated to work whatever hours were scheduled, including Saturdays.

In July 1970, Appellant joined the World Wide Church of God, which forbids work on the Sabbath (Friday sundown to Saturday sundown) and on certain holy days. From that time Appellant refused to work on Saturdays. After complaints arose from fellow supervisors who were forced to substitute for him on Saturdays, Appellant was discharged.

Appellant filed a charge of religious discrimination against Appellee with the United States Equal Employment Opportunity Commission (EEOC) and a similar complaint with the Kentucky Commission on Human Rights (KCHR). On April 12, 1972 after a hearing, the KCHR dismissed the charge.¹ On September 5, 1972, the EEOC issued a right to sue letter, and Appellant filed this action on September 26, 1972.

The parties stipulated that the transcript of the KCHR hearing should serve as the complete factual record in the District Court. On the basis of that transcript the District Court found as follows:

The plaintiff failed to appeal the order of dismissal of the Kentucky Commission on Human Rights, and that order became a final order on May 12, 1972. On September 26, 1972, the plaintiff filed the present action which is identical in all respects — parties, facts, law sought to be applied and remedy sought — with the case previously tried before the Kentucky Commission on Human Rights.

It appears that the plaintiff was afforded a full and fair hearing before the Kentucky Commission on Human Rights and that Commission properly found that the defendant's attempts to accommodate itself to the plaintiff's religious

1. Order of Ky. Comm'n on Human Rights, No. 231-E (April 12, 1972).

needs was causing the defendant undue hardship.

This Court finds from the entire record herein that the defendant made a reasonable accommodation to the plaintiff's religious needs and that no further accommodation could be made at the time of the defendant's dismissal from employment without creating an undue hardship on the employer's business.

The defendant was therefore justified in discharging the plaintiff and a Judgment will therefore this date be entered for the defendant and dismissing the complaint herein.²

On appeal, Appellant argues that the District Court's findings are erroneous and that his employer's conduct did amount to religious discrimination under Title VII. Appellee asserts three alternative bases for affirmance: (1) that the KCHR order has res judicata effect; (2) that the District Court correctly concluded that Appellee reasonably accommodated Appellant's religious practices as fully as Title VII requires; and (3) that the rule requiring employers to accommodate their employees' religious practices violates the establishment clause of the first amendment. We discuss each of these issues in turn.

2. District Court Memorandum Opinion, No. 2432 (E.D. Ky., filed March 20, 1974).

I. Res Judicata

Appellee asserted in its brief that Appellant's complaint should have been dismissed because the KCHR's order against Appellant has res judicata effect, barring relitigation of the same claim rejected by the state tribunal. It cited *Batiste v. Furnco Construction Corp.*, 350 F. Supp. 10 (N.D. Ill. 1972), in support of this contention.

At oral argument Appellee abandoned this defense in view of *Batiste's* reversal by the Seventh Circuit. *Batiste v. Furnco Construction Corp.*, 503 F.2d 447 (7th Cir. 1974).

Insofar as the District Court's decision may rest on the doctrine of res judicata, it cannot stand. A party is not foreclosed from pursuing his federal remedy under Title VII because he has first been a party to a state proceeding. *Cooper v. Philip Morris, Inc.*, 464 F.2d 9 (6th Cir. 1972).

II. Reasonable Accommodation

The basis of Appellant's complaint was 42 U.S.C. § 2000e, as it existed before its 1972 amendment. Section 2000e-2, which has not itself been amended, states in relevant part,

- (a) It shall be an unlawful employment practice -
for an employer —
 - (1) . . . to discharge any individual . . .
because of such individual's race, color,
religion, sex, or national origin

An EEOC Regulation, 29 C.F.R. § 1605.1 (1974), which was in force at the time of Appellant's discharge, provides as follows:

§1605.1 Observation of the Sabbath and other religious holidays.

(a) Several complaints filed with the Commission have raised the question whether it is discrimination on account of religion to discharge or refuse to hire employees who regularly observe Friday evening and Saturday, or some other day of the week, as the Sabbath or who observe certain special religious holidays during the year and, as a consequence, do not work on such days.

(b) The Commission believes that the duty not to discriminate on religious grounds, required by section 703(a) (1) of the Civil Rights Act of 1964, includes an obligation on the part of the employer to make reasonable accommodations to the religious needs of employees and prospective employees where such accommodations can be made without undue hardship on the conduct of the employer's business. Such undue hardship, for example, may exist where the employee's needed work cannot be performed by another employee of substantially similar qualifications during the period of absence of the Sabbath observer.

(c) Because of the particularly sensitive nature of discharging or refusing to hire an employee or applicant on account of his religious beliefs, the employer has the burden of proving

that an undue hardship renders the required accommodations to the religious needs of the employee unreasonable.

(d) The Commission will review each case on an individual basis in an effort to seek an equitable application of these guidelines to the variety of situations which arise due to the varied religious practices of the American people.

The consistency of this Regulation with pre-1972 Title VII was upheld in *Reid v. Memphis Publishing Co.*, 468 F.2d 346 (6th Cir. 1972). As we noted there, a 1972 amendment to Title VII, which incorporates the substance of this Regulation, shows that the Regulation "did express the prior intention of Congress."³ 468 F.2d at 351. Because Appellant's discharge occurred before the enactment of the 1972 amendment, his claim is governed by Regulation 1605. However, for purposes of this case there is no difference between the Regulation and the amendment. The question under either provision is whether Appellee met its burden of proving that no reasonable accommodation to Appellant's Sabbath observance was possible without imposing an undue hardship on the conduct of Appellee's business.

3. The 1972 amendment added the following paragraph to § 2000e:

(j) The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

The District Court found that Appellee "made a reasonable accommodation to [Appellant's] religious needs and that no further accommodation could be made at the time of [Appellant's] dismissal from employment without creating an undue hardship on the employer's business." The court did not specify what "undue hardship" would have resulted and did not explain why an accommodation that was reasonable for over a year (from July 1970, when Appellant joined the World Wide Church of God, until his discharge) suddenly became unreasonable in September 1971.

Our standard of review is limited when reviewing factual findings, FED. R. Civ. P. 52(a), but is unlimited when determining whether the District Court committed errors of law. Because the District Court worded its findings in conclusory fashion, it is necessary to review the evidence presented to the KCHR, which constitutes the record in this case.

The first witness to testify before the KCHR was Rev. Kelly H. Barfield of the World Wide Church of God. His testimony was that as a member of his congregation Appellant was not permitted to work from Friday sunset to Saturday sunset and on seven holy days corresponding to Jewish observances.

Appellant was the second witness. He testified that the Berea plant's operations consisted of a

Stock Preparation Department and the Banbury Department. To go from one to the other required passing through a sliding door that separated the Departments. When both Departments were working at capacity, each normally had one supervisor. When necessary, a single supervisor could handle both Departments, and this was common practice when shifts were operating at less than full capacity. While Appellant was the only supervisor specifically assigned to the Banbury Department, normally he worked only during the *first* shift (from 7:00 a.m. to 3:00 p.m., Monday through Friday), and no supervisor was assigned to the lighter second and third shifts. A supervisor from the Stock Preparation Department covered these shifts. This was feasible because the supervisor's major responsibility was to schedule production after securing orders from clients. Appellant testified that he thus spent "a very small amount of time observing" his men.

Appellant testified that upon joining the World Wide Church of God, he informed Plant Manager Saylor that he could not work Saturdays, and Saylor gave permission for this. Appellant testified that Stock Preparation supervisors substituted for him on Saturdays and that he was available to substitute for them "at any other time other than my Sabbath or an annual holy day."

When L. G. Haddock replaced Saylor as the Plant Manager in November 1970, he told Appellant that his no-Saturdays schedule would be acceptable "as long as it don't cause any problems," in Appellant's words. In August 1971 Haddock told Appellant that he had received a complaint from another supervisor about his not working on Saturdays and that he would have to start working on Saturdays. On September 3, 1971, Haddock announced that he needed a Banbury supervisor who could work six days a week, that he could not transfer Appellant "because there were supposed to be no down-grades," and that he was forced to terminate Appellant that day.

Appellant testified that he tried to schedule his vacation to coincide with some of his Church's holy days and that the efficiency and safety of the Banbury Department did not suffer with the Stock Preparation supervisor covering the Banbury Department, so long as Appellant had done proper scheduling. Appellant stated that the company allowed two employees under his supervision not to work on Sundays for religious reasons.

The third witness was Mr. Conley Saylor, the Berea Plant Manager until November 1970. He testified that in the summer of 1970 the supervisory staff was working from ten to fourteen hours a day because of extra demand imposed by a strike at Appellee's Lexington plant. Despite this, Saylor did

not call in a separate supervisor for the Banbury Department on Saturdays because "its always been kind of a set up down through the years that if the Banbury Supervisor was not there the Stock Prep. Supervisor covered both sides of it." He stated that Appellant "did a very adequate job" as Banbury Department supervisor. Saylor testified that Stock Preparation Supervisor Webb had told him that he was "tired of having to work so many hours when [Appellant] was not even working Saturdays." Saylor said that it was not good operating procedure to have one supervisor for both departments, but that this procedure had been used for years especially when shifts were light, so that problems with production were "nothing related to [Appellant's] situation."

The fourth witness was Mr. Oscar Fain, a Stock Preparation supervisor and Appellant's brother-in-law. Fain testified that Appellant had substituted for him three times and that he had volunteered to cover for Fain anytime other than a Sabbath or holy day. He said there had been dissension among the supervisors because of Appellant's no-Saturdays rule and that he had told Plant Manager Haddock "that I respected [Appellant's] religion but that if he was scheduled to work, he should work on Saturday."

Mr. Chester Webb, also a Stock Preparation supervisor, was the fifth witness. He testified that when covering both the Banbury shift and the Stock

Preparation Department, he "just went over there to make sure they were working and there wasn't nothing down, any machinery broken down or anything like that." He did not complain to Haddock about Appellant's not working on Saturdays, though he did complain to a supervisor, Mr. Hunt, that he had to work on every Saturday work was scheduled. Webb testified that Appellant volunteered to and did fill in for him when asked.

The sixth witness, Mr. Bobby Abrams, replaced Appellant at the Banbury Department after his discharge. He testified that Mr. Hunt had told him Appellant's failure to work scheduled hours was the reason for his discharge. Abrams now works whenever work is scheduled, including approximately every other Saturday. He testified that he spends seven hours of an eight-hour day supervising his men and one hour scheduling.

Mr. L. G. Haddock, Plant Manager from November 1970 through Appellant's dismissal, was the seventh witness. Several excerpts from his testimony are particularly relevant, as it was Haddock who fired Appellant.

Q-25. Why was Paul Cummins fired from Parker Seal Company?

A. Basically because he could not work Saturdays but it goes further than that,

it was a fact that he was not co-operating with the fellows down in the Stock Prep. Department.

Q-26. But basically it was because he wouldn't Saturday?

A. That was the base of the problem, yes. The problem was that he could not work with the other Supervisors, or would not.

Q-27. What do you mean, work with the other Supervisors?

A. In the Stock Prep. Department which is adjacent to the Banbury, we had three (3) Supervisors, one (1) on each shift. During July and August of 71 we had a vacation schedule in which, during four (4) straight weeks, at least one (1) of those fellows was on vacation and during that time the other two (2) guys were covering twelve (12) hours a day and we were working six (6) days a week then. They were covering twelve (12) hours a day, six (6) days a week, or seventy-two (72) hours each. And Paul at that time was working eight (8) hours a day, five (5) days a week. And I had complaints.

* * *

Q-32. Did you ever ask Paul to work on Saturdays?

A. No, sir.

Q-33. But you fired him for not working Saturdays?

A. I asked him, I think it was two (2) weeks before he left, I asked him if there was any — I knew he had adopted this religion a year and a half or two (2) years ago or so, and I did ask him if there was any possibility of his being able to change his ideas or anything like that and he told me then that he was firmly fixed with his religion.

Q-34. Is that when you decided to fire him?

A. It was after that.

* * *

His religion doesn't bother me, didn't bother me at that time, one way or the other. The fact that he could not work Saturday did. We run a plant that operates six (6) days a week a good percentage of the time. Paul, in a responsible position, running a department, had to be there if that department was to function the way it should.

* * *

Q-53. There's a problem, I can understand, but I don't understand what deep problem

Paul had that he had to volunteer to another Supervisor to work?

A. Well, when I get complaints from two (2) out of three (3) Supervisors of a department because they are working seventy (70) hours a week and Paul is only working forty (40) hours a week, then I had a problem between Supervisors. In a group of seventeen (17) Supervisors, who I was trying to weld into a group, a team, you can't do that if one (1) of them is going to be a loner.

A fair analysis of Haddock's testimony is that Appellant's no-Saturdays rule caused resentment among fellow supervisors. Haddock did not force Appellant to work longer weekday hours by ordering him to substitute for other supervisors at the end of his shift, as Haddock expected Appellant to volunteer to do this. Although Appellant did volunteer to work for his colleagues at any time other than his Sabbath and holy days, he was rarely asked to substitute. Instead, Haddock decided that Appellant had become a "loner," gave him a choice between giving up his religion or his job, and fired him when Appellant did not change his religious convictions.

The final witness was Mr. Ray Kuhn, General Manager of the Division that included Appellant's Department. He testified that there had been

production problems in 1970 and 1971, which required extra efforts by all management personnel. As a member of Appellee's Cost Goal Program, Appellant had been expected to exercise individual initiative. Kuhn testified that Appellant "was discharged because his refusal to work on Saturday was causing considerable consternation and problems with the rest of our employees who were being required to work a full shift." He testified that Sunday work was not scheduled to accommodate Appellant, adding that "I have never had to ask my employees to work Sunday."

A fair reading of the KCHR transcript indicates that the major reason for Appellant's discharge was, in the words of General Manager Kuhn, the "considerable consternation and problems with the rest of our employees who were being required to work a full shift." In short, Appellant's fellow supervisors resented having to work on Saturdays while Appellant was not forced to do so.

On this record, we see no substantial evidence to support the District Court's conclusion that accommodation of Appellant's religious practices would have imposed an undue hardship on the conduct of Appellee's business. The objections and complaints of fellow employees, in and of themselves, do not constitute undue hardship in the conduct of an employer's business. If employees are disgruntled because an employer accommodates its

work rules to the religious needs of one employee, under EEOC Regulation 1605 and §2000e(j) such grumbling must yield to the single employee's right to practice his religion. Moreover the fact that Saturday Sabbath observance by one employee forces other employees to substitute during weekend hours does not demonstrate an undue hardship on the employer's business. It is conceivable that employee morale problems could become so acute that they would constitute an undue hardship. The EEOC, in interpreting Regulation 1605, has noted the possibility of undue hardship when the employer can make a persuasive showing that employee discontent will produce "chaotic personnel problems." EEOC Decision No. 72-0606 (Dec. 22, 1971), CCH EEOC DEC. ¶6310, at 4555 (1972); EEOC Decision No. 71-463 (Nov. 13, 1970), CCH EEOC DEC. ¶6206, at 4350 (1972).

In the case at bar, however, Appellee has shown no such dire effect upon the operation of its business. To the contrary, the complaints of Appellant's fellow supervisors seem both mild and infrequent. In addition, it appears that Appellee might have alleviated at least some of the dissension if it had pursued a more active course of accommodation. For example, Appellee's officials could have required Appellant to work longer hours on week days or on Sundays. They could have reduced Appellant's salary commensurately with his shorter work week. They could have taken pains to

ensure that Appellant substituted for his colleagues on an equitable basis, rather than assuming that the co-workers would make appropriate demands upon Appellant.

Appellee was inconvenienced by Appellant's no-Saturdays rule, but to call the inconvenience shown on this record "undue hardship" would be to venture into "an Alice-in-Wonderland world where words have no meaning." *Welsh v. United States*, 398 U.S. 333, 354 (1970) (Harlan, J., concurring). Undue hardship is something greater than hardship, and Appellee did not demonstrate in the record below how accommodation to Appellant's religious practices would have imposed an unreasonable strain on its business, having lived with the situation for over one year before Appellant's discharge.

To the extent, therefore, that the District Court's decision rested on a finding that no accommodation of Appellant's religious practices was possible without an undue hardship upon Appellee's business, we are "left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948). Accordingly, the District Court's finding is clearly erroneous and cannot stand. *Parmer v. National Cash Register Co.*, 503 F.2d 275, 277 (6th Cir. 1974).

We conclude that Appellee did not reasonably accommodate Appellant's religious practices and that

Appellee has not shown that such an accommodation would have imposed an undue hardship on the conduct of its business. Thus by discharging Appellant, Appellee has discriminated against him on the basis of his religion in violation of Title VII of the Civil Rights Act of 1964.

III. First Amendment

Appellee seeks to sustain the District Court's decision upon the ground that 29 C.F.R. §1605.1 (1974) and 42 U.S.C. §2000e(j) are laws "respecting an establishment of religion" and therefore invalid under the first amendment. Appellee argues that the reasonable accommodation rule fosters religion by requiring private employers to defer to their employees' religious idiosyncrasies. Appellee points out that under the rule an employer may be required to excuse an employee from Saturday work to attend church, but an atheistic employee who wishes to go fishing on Saturdays enjoys no similar right under the Civil Rights Act. Thus Appellee believes the rule constitutes a governmentally mandated preference for religion that is impermissible under the first amendment.

In *Dewey v. Reynolds Metals Co.*, 429 F.2d 324 (6th Cir. 1970), *aff'd by an equally divided Court*, 402 U.S. 689 (1971), this court warned that to construe the Civil Rights Act "as authorizing the adoption of Regulations which would coerce or

compel an employer to accede to or accommodate the religious beliefs of all of his employees would raise grave constitutional questions of violation of the Establishment Clause of the First Amendment." 429 F.2d at 334. Two years later, in *Reid v. Memphis Publishing Co.*, 468 F.2d 346 (6th Cir. 1972), we made the following statement:

[W]e do not overlook the fact that the Dewey majority in our court expressed doubts about the constitutional validity of the E.E.O.C. regulation (29 C.F.R. 1605.1 (1970)) which is applicable to the refusal to hire appellant Reid.

Whatever doubts there may have been about the constitutionality of this regulation or its consistency with the statute have been, we believe, laid to rest by a unanimous Supreme Court in *Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S. Ct. 849, 28 L. Ed. 2d 158 (1971). While *Duke Power* dealt with racial discrimination and our current concern is with religious discrimination, the Equal Employment Statute treats them similarly.

468 F.2d at 349-50

However, in *Reid* we did not discuss specifically the establishment clause problem.

In *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973), the Supreme Court outlined the three standards that any law must meet to survive an establishment clause challenge. In order to pass

constitutional muster, a law (1) "must reflect a clearly secular legislative purpose," (2) "must have a primary effect that neither advances nor inhibits religion," and (3) "must avoid excessive government entanglement with religion." 413 U.S. at 772-73. We conclude that 42 U.S.C. §2000e(j) and 29 C.F.R. §1605.1 satisfy these tests and thus are not inconsistent with the first amendment.

First, we believe that Regulation 1605 and §2000e(j) are sustained by an adequate secular purpose. The reasonable accommodation rule, like Title VII as a whole, was intended to prevent discrimination in employment. Specifically, the rule was designed to put teeth in the existing prohibition of religious discrimination. Senator Randolph, who proposed the amendment that became §2000e(j), stated his purpose as follows:

Mr. RANDOLPH: Mr. President, freedom from religious discrimination has been considered by most Americans from the days of the Founding Fathers as one of the fundamental rights of the people of the United States. Yet our courts have on occasion determined that this freedom is nebulous, at least in some ways. So in presenting this proposal to S. 2515, it is my desire and I hope the desire of my colleagues, to assure that freedom from religious discrimination in the employment of workers is for all time guaranteed by law.

118 CONG. REC. 705 (1972).

Surely this is a far cry from cases such as *Epperson v. Arkansas*, 393 U.S. 97 (1968), in which the Supreme Court struck down an Arkansas statute prohibiting public schools and universities from teaching the Darwinian theory of evolution. The Court concluded that the law sprang from "fundamentalist sectarian conviction" and was intended "to suppress the teaching of a theory which, it was thought, 'denied' the divine creation of man." 393 U.S. at 107-09.

In addition, we think that *Gillette v. United States*, 401 U.S. 437 (1971), although obviously distinguishable from the case at bar, does set forth a rationale that is applicable here. In *Gillette* the Supreme Court rejected an establishment clause challenge to the draft exemption available to any person "who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form." 50 U.S.C. App. §456(j). The petitioners argued that §456(j) was designed to foster or favor religious sects that oppose war in any form, at the expense of sects forbidding participation in particular, "unjust" wars.

The Court concluded that §456(j) "serves a number of valid purposes having nothing to do with a design to foster or favor any sect, religion, or cluster of religions. There are considerations of a pragmatic nature, such as the hopelessness of converting a sincere conscientious objector into an

effective fighting man . . . but no doubt the section reflects as well the view that in the forum of conscience, duty to a moral power higher than the State has always been maintained.' *United States v. Macintosh*, 283 U.S. 605, 633 (1931) (Hughes, C.J., dissenting)." 401 U.S. at 452-53. The Court further stated:

The point is that these affirmative purposes are neutral in the sense of the Establishment Clause. Quite apart from the question whether the Free Exercise Clause might require some sort of exemption, it is hardly impermissible for Congress to attempt to accommodate free exercise values, in line with "our happy tradition" of "avoiding unnecessary clashes with the dictates of conscience." *United States v. Macintosh*, *supra*, at 634 (Hughes, C.J., dissenting).

401 U.S. at 453.

Similarly, we think that pragmatic, neutral purposes underlie Regulation 1605 and §2000e(j). Like the conscientious objector exemption, the reasonable accommodation rule reflects a legislative judgment that, as a practical matter, certain persons will not compromise their religious convictions and that they should not be punished for the supremacy of conscience. Without considering the impact of the free exercise clause, the Court in *Gillette* found a valid secular purpose in the congressional desire to promote and to protect the sort of conscientious action thought to be important in a democratic

society. We believe that similar considerations were implicit in the reasonable accommodation rule, which to that extent is sustained by a neutral legislative purpose.

Secondly, it is apparent to us that Regulation 1605 and §2000e(j) have a primary effect that neither advances nor inhibits religion. In practice, the reasonable accommodation rule restrains employers from enforcing uniform work rules that, although facially neutral, discriminate in effect against employees holding certain religious convictions. Thus the rule guarantees job security except when accommodation of an employee's religious practices would impose an undue hardship upon the employer's business. Regulation 1605 and §2000e(j) mandate no financial support, direct or indirect, for religious institutions, a factor we find significant in view of the traditional characterization of such governmental aid as one of the primary evils against which the establishment clause protects. See *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971); *Walz v. Tax Comm'n*, 397 U.S. 664, 668 (1970).

It cannot be denied that some religious institutions will derive incidental benefits from Regulation 1605 and § 2000e(j). For example, churches holding services on Saturdays may enjoy a somewhat larger attendance with a correspondingly fuller collection plate. Senator Randolph mentioned this possibility when speaking in favor of his amendment:

I say to the distinguished chairman of the Labor and Public Welfare Committee, who manages this bill, that there has been a partial

refusal at times of the part of employers to hire or to continue in employment employees whose religious practices rigidly require them to abstain from work in the nature of hire on particular days. So there has been, because of understandable pressures, such as commitments of a family nature and otherwise, a dwindling of the membership of some of the religious organizations because of the situation to which I have just directed attention.

118 CONG. REC. 705 (1972).

Senator Randolph also made reference to the concern of a particular pastor with respect to the problems caused by the failure of employers to adjust work schedules to fit the requirements of the faith of some of the workers. The statute and regulation are applicable to *all* members of *all* religious faiths who observe Saturday as the Sabbath. We conclude that the argument of one Senator that the proposed legislation would assist a particular pastor and religious group does not require the conclusion that Congress enacted the legislation to promote and support a particular religion.

The Supreme Court has made it clear that a law is not necessarily unconstitutional merely because it confers incidental or indirect benefits upon religious institutions. *Committee for Public Education v. Nyquist*, 413 U.S. 756, 771-72 (1973). In our view, the primary effect of Regulation 1605 and § 2000e(j) is to inhibit discrimination, not to advance religion.

Nor do we believe that Regulation 1605 and § 2000e(j) raise the spectre of excessive government entanglement with religion. Surely the reasonable accommodation requirement will not subject religious institutions to the sort of "comprehensive, discriminating, and continuing [governmental] surveillance" that the Supreme Court found impermissible in *Lemon v. Kurtzman*, 403 U.S. 602, 619 (1971). By contrast, Regulation 1605 and § 2000e(j) require little or no contact between religious institutions and governmental entities. For the most part, the EEOC and the courts will have to determine simply whether the employer has made a reasonable accommodation and whether an undue hardship will result. These issues will be considered in the labor relations context, and their resolution certainly does not necessitate any government entanglement with religion.

Appellee suggests, however, the EEOC investigators will be forced to study and to evaluate the dogma of the many religious sects in order to ascertain whether employees' practices and observances are genuinely religious and therefore protected under Title VII. In most cases, this issue probably will not be disputed seriously. To the extent that the question does arise, however, we think that it will require no more government involvement in religion than the concedely noxexcessive entanglement that occurs when a state

must determine whether a purported church qualifies for a property tax exemption. See *Walz v. Tax Comm'n*, 397 U.S. 664, 674-76 (1970); *id.* at 698-99 (opinion of Harlan, J.).

Although the foregoing discussion disposes of Appellee's first amendment contention, we think our decision here gains additional support from a group of Supreme Court cases upholding various state Sunday closing laws. *McGowan v. Maryland*, 366 U.S. 420 (1961); *Two Guys v. McGinley*, 366 U.S. 582 (1961); *Braunfeld v. Brown*, 366 U.S. 599 (1961); *Gallagher v. Crown Kosher Super Market*, 366 U.S. 617 (1961). In these cases the Court rejected establishment clause challenges, concluding that over the years the laws in question had evolved from their religious origins and had come to take on a secular character. The Court held that the statutes' present purpose and effect was not to aid religion but to set aside a uniform day of rest and recreation.

Sunday closing laws have the effect of forcing employers, even unwilling ones, to shut down operations on Sundays, thereby accommodating, at least coincidentally, the religious needs of the dominant Christian population. By contrast, § 2000e(j) requires only a reasonable accommodation of employees' religious practices, and only if that can be accomplished without undue hardship on the employer's business. Surely this constitutes a lesser

interference with the rights of the employer than does a law requiring the employer to close his business entirely. Moreover, we are unable to perceive any greater tendency toward the establishment of religion in § 2000e(j) than in the Sunday closing laws. Thus we believe the result reached here is supported, if not compelled, by *McGowan* and its companion cases.

In summary, we hold that the reasonable accommodation rule is not inconsistent with the establishment clause of the first amendment. Accordingly, we find no constitutional basis for sustaining the District Court's decision. Since we have concluded that Appellant was the victim of religious discrimination within the meaning of Title VII, we must remand the case for a determination of the appropriate relief. At this point we simply note that the District Court should consider reinstatement, back pay and attorney's fees. See 42 U.S.C. §§ 2000e-5(g), 2000e-5(k).

The judgment of the District Court is reversed and the case is remanded for further proceedings consistent with this opinion.

Costs are taxed against Parker Seal Company.

CELEBREZZE, Circuit Judge dissenting. I respectfully dissent. The Bill of Rights, which contains the First Amendment, has endured because the federal judiciary has refused to cut constitutional corners to achieve temporary solutions to immediate problems. The majority departs from this tradition today, without thought to the damage that may be done to future generations.

What the majority fails to grasp is that if Congress is permitted to breach the First Amendment by granting benefits to religion, it is thereby empowered to breach it to take away religious freedoms. In adopting the Bill of Rights the Framers were exceedingly careful to require of Government a neutral position in religious affairs, declaring religious freedom and denying special privileges to one religious group to the detriment of others. The majority, by judicial fiat, revises the Constitution, bypassing the ratification process. To follow the course advocated by the majority would mean approving a breach of the wall of separation between Church and State erected by the First Amendment. In time, as the breach grows, it could lead to political tyranny, with religious groups advancing their particular interests through our political institutions. I cannot concur in this departure from the neutral position to which Government is assigned under our form of political life.

Neutrality is the heart of the religion clauses of the First Amendment. The Supreme Court has steadfastly upheld Jefferson's injunction that Government remain neutral in religious affairs, with the First Amendment standing as "a wall of separation between church and State." *McCullum v. Board of Education*, 333 U.S. 203, 211 (1948); *Everson v. Board of Education*, 330 U.S. 1, 15-16 (1947); *Reynolds v. United States*, 98 U.S. 145, 164 (1878).¹ The wall must protect against friendly assistance as well as hostile assaults, so that religion and government remain free from the sustenance and interference of one another. See *Committee for Public Education v. Nyquist*, 413 U.S. 756, 788-89 (1973); *Everson v. Board of Education*, 330 U.S. 1, 53 (1947) (Rutledge, J., dissenting). This principle "forbids subtle departures from neutrality, 'religious gerrymanders,' as well as obvious abuses." *Gillette v. United States*, 401 U.S. 437, 452 (1971).

By Regulation 1605.1 and by 42 U.S.C. § 2000e(j), the Federal Government has breached the wall. The Regulation and Section 2000e(j) grant preferences to employees by reason of their religion, forcing modifications in seniority systems, overtime scheduling, and other forms of employee organization. An employee is exempted from work

1. Padover, *The Complete Jefferson* 518-19 (1943). See Kurland, "Of Church and State and the Supreme Court," 29 U. Chi. L. Rev. 1, 96 (1962).

on Saturdays if he demands release for religious purposes, but other employees are not accorded the same treatment if they prefer not to work on Saturdays. Not only are the latter employees not exempted, but they may have to substitute for the absent religious practitioner on Saturdays or lose their jobs.

Exemption from uniform work rules for religious reasons has been recognized as an unfair and undue preference under collective bargaining agreements. See, e.g., *John Morrell & Co.*, 17 Lab Arb. 280, 282 (1951); *Singer Co.*, 48 Lab. Arb. 1343 (1967). Judicial decisions not directly involving Regulation 1605.1 or Section 2000e(j) have underscored the inequity of a special rule for certain employees on religious grounds. See, e.g., *Dawson v. Mizell*, 325 F. Supp. 511 (E.D. Va. 1971); *Eastern Greyhound Lines Division v. New York State Division of Human Rights*, 27 N.Y. 2d 279, 265 N.E. 2d 745, *aff'd* 34 App. Div. 2d 516, 311 N.Y.S. 2d 465 (1970); *Andrews v. O'Grady*, 44 Misc. 2d 28, 252 N.Y.S. 2d 814 (1964); *Otten v. Baltimore & O. R.R.*, 205 F.2d 58 (2d Cir. 1953). See also *Hammond v. United Paperworkers Union*, 462 F.2d 174 (6th Cir.), *cert. denied*, 409 U.S. 1028 (1972); *Dewey v. Reynolds Metals Co.*, 429 F.2d 324 (6th Cir. 1970), *aff'd by equally divided court*, 402 U.S. 689 (1971).

Granting special privileges because of the exercise of one's religion is just as wrong as denying employment opportunity because of one's religious beliefs. When Government engages in either practice, it discriminates on the basis of religion and abandons its neutrality.

As the majority points out, any rule must surmount three hurdles before it can be approved under the Establishment Clause. As the Supreme Court stated in *Committee for Public Education v. Nyquist*, 413 U.S. 756, 773 (1973):

[T]o pass muster under the Establishment Clause the law in question, first, must reflect a clearly secular legislative purposes [citation omitted], second, must have a primary effect that neither advances nor inhibits religion, [citations omitted], and third, must avoid excessive government entanglement with religion.²

I believe that the rule meets neither of the first two requirements under *Nyquist*.

The majority finds two "secular" purposes in the rule. First, it asserts that the rule is meant "to put teeth in the existing prohibition of religious discrimination." Second, it reasons that "the

2. See also *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971); *Gillette v. United States*, 401 U.S. 437, 450 (1971).

reasonable accommodation rule reflects a legislative judgment that, as a practical matter, certain persons will not compromise their religious convictions and that they should not be punished for the supremacy of conscience." Neither of these rationales justifies the rule.

There is no doubt that Congress acted with a valid secular purpose in banning employment discrimination based on religion through Title VII of the Civil Rights Act of 1964. 42 U.S.C. § 2000e, *et seq.* The expressed purpose of that legislation was to end discrimination based on certain factors that had no relation to an individual's ability and initiative and, accordingly, to end the burden on interstate commerce imposed by various forms of invidious discrimination.³ The object was to make religion a meaningless factor in employment decisions.

This secular purpose does not justify the 1972 religious accommodation amendment, which incorporated EEOC Regulation 1605.1 into Title VII. Section 2000e(j) defines religion so as to require that persons receive preferential treatment because of their religion. This contradicts the secular purpose behind the original Title VII. Rather than "putting teeth" into the Act, it mandates religious discrimination, thus departing from the Act's basic

3. 110 Cong. Rec. 1521-28 (1964).

purpose. See *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971).

The second purportedly secular justification for the rule is that it recognizes that "certain persons will not compromise their religious convictions" and ensures "that they will not be punished for the supremacy of conscience."

The absence of a religious accommodation rule, however, would not amount to punishment. It would simply be a "hands-off" attitude on government's part, allowing employers and employees to settle their own differences. The rule grants benefits to religious practitioners because of their religion. The second rationale the majority advances, therefore, amounts to an assertion that it is a valid secular purpose to grant preferences to persons whose religious practices do not fit prevailing patterns. Indeed, the legislative history of the 1972 amendment reveals Congressional thinking that the Establishment Clause was not violated because "[i]n dealing with the free exercise [of religion], really, this promotes the constitutional demand in that respect."⁴

It is, of course, fundamental that the First Amendment protects the free exercise of all religions, whatever the number of their practitioners.

4. Remarks of Sen. Williams, 118 Cong. Rec. 706 (1972).

"A way of life that is odd or even erratic but interferes with no rights or interests of others is not to be condemned because it is different." *Wisconsin v. Yoder*, 406 U.S. 205, 224 (1972). Thus, Government may not penalize persons on the basis of their religion.

The Free Exercise Clause requires, for example, that when Government distributes unemployment benefits, it not withhold them from persons who refuse to work on Saturday because of their religious beliefs but are willing to take jobs which do not require Saturday work, *Sherbert v. Verner*, 374 U.S. 398 (1963). The holding in *Sherbert* "reflects nothing more than the governmental obligation of neutrality in the face of religious differences, and does not represent that involvement of religious with secular institutions which it is the object of the Establishment Clause to forestall." 374 U.S. at 409. *Sherbert* means that Government may not grant benefits to a uniform class of persons but exclude certain people "because of their faith, or lack of it." *Sherbert*, 374 U.S. at 410, citing *Everson v. Board of Education*, 330 U.S. 1, 16 (1947). See also *Wisconsin v. Yoder*, 406 U.S. 205 (1972). But cf. *Braunfeld v. Brown*, 366 U.S. 599 (1961); *Cleveland v. United States*, 329 U.S. 14 (1946); *Reynolds v. United States*, 98 U.S. 145 (1878).

The fact that Government may not penalize particular religions⁵ does not mean that Congress may favor particular religions. On the contrary, it means that Congress may not. The argument that aid to religious institutions is justified under a broad reading of the Free Exercise Clause had been raised on behalf of aid to parochial schools and other benefits to religious groups. See *Lemon v. Kurtzman*, 403 U.S. 602, 665 (1971) (White, J., dissenting); *Welsh v. United States*, 398 U.S. 333, 367 (1970) (White, J., dissenting); *Abington School District v. Schempp*, 374 U.S. 203, 308 (1963) (Stewart, J., dissenting).⁶ The argument has appeared in dissenting opinions, and Supreme Court majorities have consistently rejected it. In *Illinois ex rel. McCollum v. Board of Education*, 333 U.S. 203 (1948), for example, where use of the public schools for religious services during school hours was declared unconstitutional, respondents had urged that the First Amendment was "intended to forbid only government preference of one religion over

5. The current test is that Government establish a "compelling state interest" to overcome a showing of "undue burden" on the free exercise of a particular religion. *Sherbert, supra*; *Wisconsin v. Yoder, supra*.

6. See Schwarz, "No Imposition of Religion: The Establishment Clause Value," 77 Yale L.J. 692 (1968).

another, not an impartial governmental assistance of all religions." 333 U.S. at 211. Their argument was rejected because government aid to all religions "is not separation of Church and State." 333 U.S. at 212. *McCollum's* reasoning has been reaffirmed repeatedly, *Torcaso v. Watkins*, 367 U.S. 488, 494 (1961); *Zorach v. Clauson*, 343 U.S. 306, 315 (1952).⁷ The Free Exercise Clause provides a shield against government interference with religion, but it does not offer a sword to cut through the strictures of the Establishment Clause. The "secular purposes" advanced by the majority are nothing more than reiterations of justifications rejected in *McCollum*, *Lemon*, and *Torcaso*. There is no valid secular legislative purpose behind the rule. Its purpose is to protect and advance particular religions.

This purpose is clearly evident in the remarks of Senator Randolph, who authored the 1972 amendment. Although the majority cites his

7. *Zorach* held that a public school system does not violate the Establishment Clause by allowing pupils "released time" for religious instruction outside school building and grounds during what would otherwise be "school time." *Zorach* explicitly reaffirmed *McCollum*, 343 U.S. at 315, stating, "The government must be neutral when it comes to competition between sects." *Zorach's* holding that government "can close its doors or suspend its operations as to those who want to repair to their religious sanctuary for worship or instruction," 343 U.S. at 314, does not control this case. Here Government has required employers to accommodate to their employee's religious practices.

argument that the amendment would advance freedom from religious discrimination (despite its requiring discrimination on religious grounds), the majority fails to quote the real reason why Senator Randolph introduced the amendment:

I say to the distinguished chairman of the Labor and Public Welfare Committee, who manages this bill, that there has been a partial refusal at times on the part of employees whose religious practices rigidly require them to abstain from work in the nature of hire on particular days. So there has been, because of understandable pressures, such as commitments of a family nature and otherwise, a dwindling of the membership of some of the religious organizations because of the situation to which I have just directed attention.

My own pastor in this area, Rev. Delmer Van Horne, has expressed his concern and distress that there are certain faiths that are having a very difficult time, especially with the younger people, and understandably so, with reference to a possible inability of employers on some occasions to adjust work schedules to fit the requirements of the faith of some of their workers.⁸

The purpose evident in these remarks is the promotion of certain religions whose followers'

8. 118 Cong. Rec. 705 (1972). Although arguments made on behalf of legislation do not condemn it if a valid purpose exists, legislative history is one guide to discerning the purpose of legislation. *McGowan v. Maryland*, 366 U.S. 420, 453 (1961).

practices conflict with employers' schedules. The promotion of a particular religion is not a justifiable ground for legislation. Otherwise, the neutrality principle, which is the core of the First Amendment, would be violated.

Not only does the religious accommodation rule lack a secular purpose. It also fails the second test under *Nyquist*. It lacks "a primary effect that neither advances nor inhibits religion," 413 U.S. at 773. It is, in other words, neither "evenhanded in operation" nor "neutral in primary impact," *Gillette*, 401 U.S. at 450. *Accord Everson v. Board of Education*, 330 U.S. 1, 15 (1947). The religious accommodation rule violates these principles in two respects.

First, the religious accommodation requirement discriminates between religion and non-religion. Only those with "religious practices" may benefit from the rule. Others are forced to submit to uniform work rules and to bear the burdens imposed by their employers' accommodation to religious practitioners. Thus, the rule discriminates against those with no religion, although the freedom not to believe is within the First Amendment's protection. *Torcaso v. Watkins*, 367 U.S. 488 (1961); *Board of Education v. Barnette*, 319 U.S. 624, 641 (1943).

Second, it discriminates among religions. Only those which require their followers to manifest their

belief in acts requiring modification of an employer's work rules benefit, while other employees are inconvenienced by the employer's accommodation. By singling out particular sects for government protection, the Federal Government has forfeited the pretense that the rule is merely part of the general ban on religious discrimination. "The government must be neutral when it comes to competition between sects." *Zorach v. Clauson*, 343 U.S. 306, 315 (1952).⁹ It has not been neutral here.

In two respects, then, the religious accommodation rule is neither "neutral in primary impact" nor "evenhanded in operation." Unlike the exemption from the draft laws for those conscientiously opposed to all war upheld in *Gillette*, the preference here is extended on the explicit basis of "religious practices" under the Regulation and "all aspects of religious observance and practice, as well as belief" under the 1972 amendment. The primary, indeed the sole, impact of the rule is to aid particular persons on the basis of their religion. Thus, it is incorrect to say, as does the majority, that the primary effect of the rule "is to inhibit discrimination, not to advance religion." The rule mandates discrimination on the explicit basis of religion. its primary effect is to aid particular religious sects.

9. See also *Everson v. Education*, 330 U.S. 1, 15 (1947).

Accordingly, the religious accommodation requirement violates the First Amendment. As we stated recently in *Daniel v. Waters*, ___F.2d___, No. 74-2230 (6th Cir. April 10, 1975), citing *Epperson v. Arkansas*, 393 U.S. 97, 103-40:

Government in our democracy, state and national, must be neutral in matters of religious theory, doctrine, and practice. It may not be hostile to any religion or to the advocacy of no-religion; and it may not aid, foster, or promote one religion or religious theory against another or even against the militant opposite. The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.

As early as 1872, this Court said: "The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect." *Watson v. Jones*, 13 Wall. 679, 728. This has been the interpretation of the great First Amendment which this Court has applied in the many and subtle problems which the ferment of our national life has presented for decision within the Amendment's broad command.

Because the religious accommodation rule violates the First Amendment under the first two tests of *Nyquist*, it is unnecessary to consider whether it also fosters "excessive entanglement" of Church and State. *Lemon v. Kurtzman*, 403 U.S. 602, 613 (1971); *Walz v. Tax Commission*, 397 U.S.

664, 674 (1970). It is fair to note, however, that the 1972 amendment is worded far more broadly than Regulation 1605.1. The 1972 amendment extends to "all aspects of religious observance and practice, as well as belief." 42 U.S.C. § 2000e(j). It therefore protects employees who object on religious grounds to making particular products (e.g., a religious pacifist's refusal to make ammunition), to shaving (e.g., *Eastern Greyhound Lines Division v. New York State Division of Human Rights*, 27 N.Y. 2d 279, 265 N.E. 2d 745 (1970)), to joining a union in a closed shop (e.g., *Gray v. Gulf, Mobile & Ohio R.R.*, 429 F.2d 1064 (5th Cir. 1970), *cert. denied*, 400 U.S. 1001 (1971)), and to doing a host of other things often required of employees by employers.¹⁰ Disposition of complaints under the amendment will require inquiry into the sincerity with which beliefs are held and force consideration of the validity of the religious nature of claims, procedures which are not favored and may themselves be improper because they put courts in review of religious matters.¹¹

10. See generally Comment, "Religious Observance and Discrimination in Employment," 22 *Syr. L. Rev.* 1019 (1971).

11. See *United States v. Ballard*, 322 U.S. 78 (1944); *Founding Church of Scientology v. United States*, 409 F.2d 1146 (D.C. 1969); *Wisconsin v. Yoder*, 406 U.S. 205, 215-16 (1972).

Striking down the religious accommodation rule would not change the law requiring employers to disregard religion in employment decisions. Discrimination based on religion is illegal. If a Saturday Sabbath observer can show that an employer discharged him for refusing to work on Saturdays although similarly situated employees were not required to work on Saturdays or were exempted from Sunday work, he could maintain that the actual reason for his discharge was religious discrimination, not his refusal to work on Saturdays. Cf. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804 (1973); *Long v. Ford Motor Co.*, 496 F.2d 500 (6th Cir. 1974). Similarly situated employees must be treated equally. Striking down the accommodation requirement would merely ensure that no employee be treated preferentially because of his religion.

It may be asked whether striking down the religious accommodation rule would deprive our nation of a rich diversity of religious practices by allowing prevailing employment policies to force persons into predominant patterns of religious observance.

Our heritage has not withered because of the constitutional requirement that Government keep "hands off" religion. The heavy hands of Government may not be raised against or in favor of religion. As Judge Learned Hand wrote,

The First Amendment protects one against action by the government, though even then, not in all circumstances [footnote omitted]; but it gives no one the right to insist that in the pursuit of their own interests others must conform their conduct to his own religious necessities. A man might find it incompatible with his conscience to live in a city in which open saloons were licensed; yet he would have no constitutional right to insist that the saloons must be closed. He would have to leave the city or put up with the *iniquitous dens*, no matter what economic loss his change of domicile entailed. We must accommodate our idiosyncrasies, religious as well as secular, to the compromises necessary in communal life; and we can hope for no reward for the sacrifices this may require beyond our satisfaction from within, or our expectations of a better world.¹²

This is not to say that a wise employer could not decide that as a matter of sound business practice and good employee relations to accommodate to his employees' religious practices. Forbidding the government from *requiring* accommodation would not be holding that accommodation may not be made by private or public employers. There must be room to maneuver between the Free Exercise and the Establishment Clauses. This space is properly

12. *Otten v. Baltimore & O. R.R.*, 205 F.2d 58, 61 (2d Cir. 1953).

filled by the employer's discretion. *Cf. Stein v. Oshinsky*, 348 F.2d 999 (2d Cir. 1965). Striking down the accommodation requirement would merely serve to permit this range of discretion.

Like the majority, I believe that religious discrimination in employment must end. Title VII says that it must and promises that it will. In pursuit of this objective, I cannot condone a rule that mandates discrimination on the basis of religion. This rule breaches the neutrality principle which is at the heart of the First Amendment. Mindful of my obligation to preserve the Bill of Rights, I respectfully dissent.

APPENDIX E

APPENDIX E

Filed May 23, 1975

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

No. 74-1607

PAUL CUMMINS,

Plaintiff-Appellant,

v.

PARKER SEAL COMPANY, Defendant-Appellee.

Before: PHILLIPS, Chief Judge, and CELEBREZZE and
McCREE, Circuit Judges.

JUDGMENT

APPEAL from the United States District Court
for the Eastern District of Kentucky.

THIS CAUSE came on to be heard on the
record from the United States District Court for the
Eastern District of Kentucky and was argued by
counsel.

ON CONSIDERATION WHEREOF, It is now
here ordered and adjudged by this Court that the

judgment of the said District Court in this cause be and the same is hereby reversed and the cause is remanded for further proceedings.

It is further ordered that Plaintiff-Appellant recover from Defendant-Appellee, the costs on appeal, as itemized below, and that execution therefor issue out of said District Court.

ENTERED BY ORDER OF THE COURT.

/s/ John P. Hehman

Clerk

A True Copy.

Attest:

Issued as Mandate:

COSTS:

Filing fee	\$
Printing	\$
Total	\$

John P. Hehman , Clerk

APPENDIX F

APPENDIX F

Filed July 18, 1975
John P. Hehman, Clerk

No. 74-1607

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

PAUL CUMMINS, Plaintiff-Appellant,

v. ORDER DENYING
 PETITION FOR REHEARING

PARKER SEAL COMPANY, Defendant-Appellee.

Before PHILLIPS, Chief Judge, and CELEBREZZE and McCREE, Circuit Judges.

No judge of the court having moved for rehearing in banc and the petition for rehearing having been considered, it is ORDERED that the petition for rehearing be and hereby is denied. Judge Celebrezze would grant the petition for rehearing for the reasons stated in his dissenting opinion.

62a

Entered by order of the court.

John P. Hehman, Clerk

By /s/ Grace Keller
Grace Keller
Chief Deputy

APPENDIX G

APPENDIX G

Nos. 74-1761 and 74-1762

U.S. COURT OF APPEALS
SIXTH CIRCUIT (CINCINNATI)

MCCANN L. REID PLAINTIFF-APPELLANT

VS.

MEMPHIS PUBLISHING
CO. DEFENDANT-APPELLEE

Decided August 20, 1975

WEICK, Circuit Judge:—Appellant Reid has appealed from an order of the District Court denying his motion to assess attorney's fees against appellee, Memphis Publishing Company. The Publishing Company has cross-appealed from a judgment entered against it in favor of Reid in the amount of \$7,349, for damages for allegedly failing to employ him as a copyreader in one of its newspapers, because of his religion.

This is Reid's second appeal. Our opinion in the first appeal is reported at 468 F.2d 346, 5 FEP Cases 69 (6th Cir. 1972).

In his complaint Reid alleged that the defendant failed to employ him as a copyreader in one of its

newspapers. Memphis Press Scimitar, because of his race (Negro) and his religion (Seventh Day Adventist) in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq. He prayed for a mandatory injunction ordering the defendant to employ him as a copyreader, awarding him back pay from the date of his application for employment (September 1967), and attorney's fees.

The District Court heard the evidence and on August 13, 1971 it adopted findings of fact and conclusions of law. The Court found that the defendant did not discriminate against the plaintiff in failing to employ him, either on account of his race or his religion.¹

Relying on our decision in *Dewey v. Reynolds Metals Co.*, 429 F.2d 324, 2 FEP Cases 687, 869 (6th Cir. 1970), affirmed by an equally divided court 402 U.S. 689, 3 FEP Cases 508 (1971), the District Court held that the Press Scimitar was not required to accommodate Reid's religious practice of not working on Saturdays inasmuch as the position of copyreader, for which Reid had applied, required work on Saturdays. The Press Scimitar had never employed a copy reader who would not work on Saturdays. The District Court dismissed Reid's complaint.

1. The findings of fact and conclusions of law are set forth in our opinion in the first appeal and need not be repeated here.

On appeal (Reid's first appeal) the panel approved the findings of fact of the District Court and also its conclusions of law with respect to the racial issue, and that issue is no longer in the case.

The panel distinguished *Dewey* on the ground that it involved a major issue of arbitrability which is not present in the case at bar.²

Dewey was further distinguished on the ground that Regulation § 1605.1 of E.E.O.C. (39 C.F.R. 1605, adopted July 10, 1967) requiring accommodation, had not been adopted and was not in force at the time the controversy in *Dewey* arose, although the District Court in that case had erroneously applied it retroactively. This regulation was in full force and effect at the time Reid applied to defendant for employment.

The employer in *Dewey* also permitted its employees to arrange for substitutes when they were required to work on Saturdays or Sundays, and we held that was an accommodation.

The panel remanded the case to the District Court to determine—

“. . . whether the Press Scimitar could make “reasonable accommodation” to the religious

2. The question of arbitrability was finally set to rest by the Supreme Court in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 7 FEP Cases 81 (1974). This question may have been the sole reason for the division of the Supreme Court in *Dewey*.

practices of Reid without undue hardship". (468 F.2d 346, 5 FEP Cases 69)

It is interesting to note that in the "Conclusion" of his brief filed in the first appeal in this Court on March 8, 1972, Reid—

. . . respectfully prays this Court to reverse the decision of the district court and order the defendant appellee immediately to offer acceptable employment to the plaintiff.

Notwithstanding this prayer, it appears from the record in the present appeal that Reid nearly two years previously had accepted employment from another employer on July 1, 1970, at a salary higher than that offered by defendant. No mention was made of this fact in the findings of fact and conclusions of law adopted by the District Court at the first trial on August 13, 1971, nor in our opinion in the first appeal. 468 F.2d 346, 5 FEP Cases 69 (6th Cir. 1972). We would think that if this fact was in evidence the District Judge would have included it in his findings.

In his brief filed in the present appeal (second appeal) Reid offers the following explanation of his conduct, in footnote 1 on page 11:

"Today plaintiff, because of the lengthy delays of litigation, has other employment. He sought this employment to survive and to mitigate damages. Like teachers discharged without due process, he is

entitled to back-pay. If he were still interested in this job, the defendant could, for the time, attempt an accommodation. The court below has denied attorneys fees because no injunction is now necessary. The net effect of that ruling is to penalize plaintiff and his counsel for attempting to mitigate damages."

No supporting record references are cited. This explanation simply does not make sense. Reid had already accepted other satisfactory employment at a higher salary, more than a year prior to the time the District Court adopted its findings of fact and conclusions of law at the first trial.

At the time Reid made application to defendant for the position of copyreader, Reid had employment as Editor of Tri-State Defender, at a salary of \$100 per week. His beginning salary in defendant's employ would have been \$125 per week plus stated annual increases if his work was satisfactory.

The claim that he accepted the new employment to mitigate damages is not understandable. He was not required to quit his employment at Tri-State Defender in order to secure a higher salary, for the benefit of the defendant, and he did not do so.

Furthermore, on the remand it does not appear that Reid offered to give the defendant the benefit of his higher salary to reduce his claim for damages, and the District Court in assessing damages allowed

only the difference between the salary offered by defendant (\$125 per week) and his salary at Tri-State Defender (\$100 per week) in computing damages at \$7,349, for the period from October, 1967 through June, 1970. Thus Reid's new position was not accepted by him in order to "survive and mitigate damages" as his brief alleges.

On the remand it was clear that the issue of mandatory injunction had long become moot, and the District Judge considered only the question of damages.

The District Court stated:

Since this suit was filed plaintiff has gained other satisfactory employment and does not at this time seek to become employed by the defendant. The relief now sought is monetary damages only. The amount of damages sought is the difference between what plaintiff would have earned while working as a copyreader for the defendant and the pay he received until he took a position paying more than he would have earned as a copy reader for the defendant, and attorney's fees.

(369 F.Supp. at 686, 7 FEP Cases at 15)

The District Court was fully conversant with all of these facts when it denied attorney's fees to Reid. In our opinion it did not abuse its discretion in so doing, and its judgment, from which Reed appealed, is affirmed.

I. The defendant owned and operated two large newspapers in Memphis, Tennessee, named The Commercial Appeal, which is a morning newspaper, and The Memphis Press-Scimitar, which is an afternoon newspaper, the Press-Scimitar publishing three editions daily (excluding Sundays) and two on Saturdays. The Commercial Appeal publishes every day, including Sunday.

Each newspaper maintains its own editorial department and they operate competitively, although they do not raid each other's personnel. The editorial departments include editors, copyreaders and reporters.

In September, 1967 Reid applied to the News Editor of the Press Scimitar for the position of copyreader. The Press Scimitar had ten copyreaders. One of its copyreaders, George Lapidès, desired to be transferred to the Sports Department, and if the transfer were made there would be a vacancy. Lapidès worked on Saturdays. Reid had been in the employ of the Tri-State Defender, a small weekly newspaper, located in Memphis.

The Press Scimitar's News Editor arranged for Reid to take a test, which he passed, and he was then sent to the Managing Editor, and by him to the Editor, for a final interview. Both News and Managing editors recommended his employment. At the final interview with the Editor, Reid's

compensation of \$125 per week was agreed upon, which was \$25 per week more than he was receiving at Tri-State Defender.

During the course of his conversation with the Editor, Reid mentioned for the first time that he was a member of the Seventh Day Adventist, and that he could not accept employment requiring him to work on Saturdays. This fact had not been disclosed either to the News Editor or to the Managing Editor.

To employ Reid as a copyreader would have created serious and difficult problems for the newspaper, because Reid would never work on any Saturday and would be off work more than fifty Saturdays in a year. The Press Scimitar publishes two editions on Saturday; and even in an emergency when momentous news breaks, which has to be processed immediately because otherwise it becomes stale, the newspaper could never call upon Reid for any help on Saturdays.

The only position which the Press Scimitar had open was one which required work on Saturdays, and the man whom Reid was to replace if he was hired, worked on Saturdays.

The Commercial Appeal, on the other hand, publishes on Saturdays and Sundays. If it had an opening for a copyreader it could have accommodated Reid by having him exchange with a

copyreader who wanted to work on Saturdays instead of Sundays. Commercial Appeal had employed Negroes as well as Seventh Day Adventists. Reid did not apply to the Commercial Appeal for any position, and there was no proof offered that it had an opening for a copyreader.

Copyreaders are specialists and are not readily interchangeable. The minimum number of copyreaders employed by the Press Scimitar from Monday through Friday, is seven; on Saturday the minimum is five.

Copyreaders serve as a "reduction group" to sift through, sort out, reduce, and locate in appropriate places in the newspaper all of the news which comes in by wire, from reporters and from other sources. The newspaper would not have space to publish all of the news which it receives, and not all news which it receives is newsworthy. It takes real specialists to handle this work.

The Press Scimitar's copyreaders include a news editor, called a "slot man," a telegraph man, and a man to handle mid-south news; all of these positions require special skills and experience. The remaining copyreaders handle routine work of lesser importance such as special features, make up, and markets.

The heaviest publication days are the first five days of the week, and the best qualified copyreaders are usually assigned to work on those days, leaving

Saturdays as their day off. These are all men who would have seniority over Reid, if hired. It is necessary, occasionally, for copyreaders to work overtime during the first five days of the week.

The problems of work-scheduling copyreaders is set forth in the findings of fact adopted by the District Court, on the remand, and the Court's findings are appended hereto as Appendix "A."

Even under ordinary circumstances, without anyone claiming special privileges, the work-scheduling of copyreaders presents a difficult task. This task is performed by the News Editor, with the approval of the Editor. In making the assignments he must take into account their special skills and adaptability for the work. The normal workday for copyreaders is eight hours; it ranges, however, from five o'clock a.m. until 4:30 p.m., except on Saturday when it extends only to 1:30 p.m. The News Editor must take into account absences of the copyreader on account of accident, illness, and vacation. Vacations run for two, three, or four weeks, depending on length of service. Seniority must be taken into account also. Reid, as a new employee, would have no seniority.

In order for Reid to be accommodated, another copyreader who had seniority over Reid, would have to be involuntarily assigned to take his place on every Saturday, even though the other man did not desire to work on that day.

In Dewey, supra, there was no problem in providing substitutes for employees who did not want to work on Saturdays or Sundays, because that case involved a manufacturing plant with many employees who were doing the same type of work as Dewey. Some were pleased to have Dewey work in their place on Sundays, and they would substitute for him on Saturdays when requested; but Dewey finally took the position that it was a sin for him to ask anyone to substitute for him. The employer in Dewey required the employees to make their own arrangements, in order to avoid discrimination, and when Dewey declined and refused to work on Saturdays he was discharged.

Our case presents a problem entirely different than Dewey, because it involves only a limited number of specialists.

Copyreaders having seniority usually do not want to work on Saturday. They have already worked forty hours during the first five days of the week, and some may even have worked overtime. If they are required to work on Saturdays, they would be entitled to overtime compensation. The Editor was of the opinion that even overtime was not a reasonable alternative. He was of the view that in order to accommodate Reid it would have been necessary for his newspaper to employ still another copyreader in addition to Reid.

In his findings of fact the District Judge found that the proof of expense which the newspaper would

incur in order to accommodate Reid, was not specific. We disagree. The proof was specific that overtime would cost \$77 per day. The extra copyreader would cost about \$125 per week, which was the salary offered to Reid by Press Scimitar.

The Editor was of the opinion that to hire Reid, with all Saturdays off, would create a serious morale problem among the other nine copyreaders who would have seniority over Reid, but who, nevertheless, would be involuntarily assigned to take his place for Saturday work. The copyreader could believe that Reid was being given favorable treatment over them, because of his religion, and that they were being discriminated against and were being penalized because they did not hold the same religious beliefs as Reid.

Furthermore, because Reid would never work on Saturdays, he could not be considered for promotion to better positions such as News Editor, Managing Editor, and Editor, all of whom work on Saturdays when necessary.

The District Court also made the following ultimate finding with respect to hardship:

While it is true that the plaintiff's lack of experience on this newspaper's staff and the then existing problems of scheduling would cause additional burdens, which might be considered a hardship for management personnel, the test is *undue* hardship, which the Court does not believe to be established by the proof.

(369 F.Supp. at 690, 7 FEP Cases at 18).

Thus, the District Court was of the view that it is all right to impose a hardship on an employer, so long as it is not an *undue* hardship.

It is noteworthy that the District Court made no finding that the Press Scimitar discriminated against Reid on account of his religion. All that it found was that it would not have been an undue hardship for the Press Scimitar to accommodate Reid's religious practice.

Webster's New International Dictionary defines hardship as follows:

"1. Hard circumstances of life; 2. a thing hard to bear; specific cause of discomfort or suffering as poverty, pain, etc. Syn. difficulty."

Undue is defined:

"1. Not yet owing or payable as a debt; 2. improper; not appropriate or suitable; 3. not just, legal or equitable; 4. excessive, unreasonable, immoderate."

The District Court was of the view that Press Scimitar should have employed Reid on a trial basis in order to see how it would work out; but the District Court had already found that this would create a hardship. It would have imposed an additional hardship and expense on the newspaper "to try him out," when it knew it would not work.

Apparently no hardship was imposed on Reid, because in July, 1970, long before the first trial, he accepted other employment at a higher salary, and which employment apparently did not require him to work on Saturday. He is no longer interested in working for Press Scimitar. All he wants now are damages, plus attorney's fees.

The undue hardship imposed on the Press Scimitar in the present case, as shown by the evidence and the findings of fact of the District Court include:

(1) Requiring it to employ Reid as a copyreader in a position which regularly required working on Saturdays, and to replace an employee who worked on Saturday, when Reid declined to work on these days because of his religious beliefs and practice as a Seventh Day Adventist.

(2) To employ Reid would require the employer to assign, involuntarily, other copyreaders who would have seniority over Reid, to take his place, thereby incurring overtime expense amounting to \$77 per day. The Editor testified that even overtime was not a reasonable alternative, and that it would probably be necessary to employ an additional copyreader. Thus, to employ Reid would require the employer to employ two copyreaders, when it needed only one.

(3) The involuntarily assignment of other copyreaders to work on Saturday to substitute for Reid, when they had seniority over Reid, who had no

seniority, would create serious morale problems among the other copyreaders.

In our opinion the ultimate finding of the District Court that the accommodation of Reid's religious practice of not working on Saturdays would not have imposed an undue hardship on his employer, is not supported by substantial evidence and is clearly erroneous.

II. Title VII of the Civil Rights Act of 1964 contains two sections which are relevant to the controversy here.

42 U.S.C. § 2000e-2(a) provides:

(a) It shall be an unlawful employment practice for an employer--

(1) to fail or refuse to hire or to discharge any individual or otherwise *discriminate* against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; . . .

(Emphasis added).

42 U.S.C. § 2000e-5(g) provides in relevant part:

. . . No order of the Court shall require . . . the hiring reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual . . . was refused employment or advancement or was suspended or discharged for

any reason other than *discrimination* on account of race, color, religion, sex, or national origin . . .

(Emphasis added).

These two statutes are plain and unambiguous. They are aimed solely at discrimination and nothing else.

The legislative history of the 1964 Act indicates that Congress was concerned that management prerogatives should be left undisturbed to the greatest extent possible, and that internal affairs of employers must not be interfered with except to the limited extent that correction is required in *discriminatory* practices. 1964 U.S. Cong. & Adm. News, at 2516.

EEOC recognized the congressional mandate in its initial 1966 Guidelines. These Guidelines provided:

Section 1605.1(a):

“(3) However, the Commission believes that an employer is free under Title VII to establish a normal work week (including paid holidays) generally applicable to all employees, notwithstanding that this schedule may not operate with uniformity in its effect upon the religious observances of his employees. For example, an employer who is closed for business on Sunday does not discriminate merely because he requires that all his employees be available for work on Saturday.”

Section 1605.1(b):

“(3) The employer may prescribe the normal work week and foreseeable overtime requirements, and, absent an intent on the part of the employer to discriminate on religious grounds, a job applicant or employee who accepted the job knowing or having reason to believe that such requirements would conflict with his religious obligations is not entitled to demand any alterations in such requirements to accommodate his religious needs.”

These two guidelines carried into effect the will of Congress as expressed in 42 U.S.C. §§ 2000e(a) and 2000e-5(g). They expressly recognized that the employer was free under Title VII to establish a normal work week (including paid holidays) generally applicable to all employees, even though it may not operate with uniformity in its effect upon the religious observances of his employees. The job applicant, knowing or having reason to believe that such requirements would conflict with his religious obligations, was not entitled to demand any alterations in the requirements to accommodate his religious needs. Under this regulation Reid would not have been entitled to demand any accommodation from Press Scimitar to accommodate his religious practices.

It was not until 1967 that EEOC abandoned the 1966 Guidelines and adopted a new Guideline, which provides as follows:

PART 1605—GUIDELINES ON
DISCRIMINATION BECAUSE OF
RELIGION

§ 1605.1 Observation of the Sabbath and other religious holidays.

(a) Several complaints filed with the Commission have raised the question whether it is discrimination on account of religion to discharge or refuse to hire employees who regularly observe Friday evening and Saturday, or some other day of the week, as the Sabbath or who observe certain special religious holidays during the year and, as a consequence, do not work on such days.

(b) The Commission believes that the duty not to discriminate on religious grounds, required by section 703(a)(1) of the Civil Rights Act of 1964, includes an obligation on the part of the employer to make reasonable accommodations to the religious needs of employees and prospective employees where such accommodations can be made without undue hardship on the conduct of the employer's business. Such undue hardship, for example, may exist where the employee's needed work cannot be performed by another employee of substantially similar qualifications during the period of absence of the Sabbath observer.

(c) Because of the particularly sensitive nature of discharging or refusing to hire an employee or applicant on account of his religious beliefs, the employer has the burden of proving that an undue hardship renders the required accommodations to the religious needs of the employee unreasonable.

(d) The Commission will review each case on an individual basis in an effort to seek an equitable application of these guidelines to the variety of situations which arise due to the varied religious practices of the American people.

(Sec. 713(b), 78 Stat. 265; 42 U.S.C. 2000-12 [§ 2000e-12(b)] [32 F.R. 10298, July 13, 1967])

This guideline for the first time decreed that the duty not to discriminate on religious grounds included an additional obligation on the part of the employer to accommodate all of the religious practices of his employees or prospective employees so long as they did not impose an undue hardship on him.

We submit that a fair reading of the two statutes hereinbefore quoted discloses no such legislative intent, nor is the guideline supported by the legislative history which we have detailed in Dewey. The clear language of the statutes does not indicate that Congress ever intended to coerce employers into accommodating all of the religious practices of their employees or prospective employees.

Title VII, in proscribing discriminatory practices in employment, served a legitimate and laudable legislative purpose; the 1967 EEOC Guideline 1605.1 does not. By this Guideline EEOC has injected something new and entirely different from discrimination. It has required employees not only to tolerate the religious beliefs but also all of the religious practices of their employees, no matter what they are,

even though a hardship is inflicted on the employer, so long as it is not an undue hardship. The legislative history of the Act does not show anything that employers have done to warrant such treatment.

In *Dewey*, supra, the District Court applied the 1967 Guideline notwithstanding the fact that it was not in force at the time the claim in that case accrued. The 1966 regulation was actually in force when the controversy in *Dewey* arose. We expressed doubts in footnote 1, in *Dewey*, as to the authority of EEOC to adopt the 1967 Guideline which was erroneously applied by the District Judge. We stated:

It should be observed that it is regulation 1605.1(b) and not the statute (§ 2000e-2(a)) that requires an employer to make reasonable accommodation to the religious needs of its employees. As we have pointed out, the gravamen of an offense under the statute is *only* discrimination. The authority of EEOC to adopt a regulation interfering with the internal affairs of an employer, absent discrimination, may well be doubted.

(429 F.2d at 331, n.1, 2 FEP Cases at 691)

This doubt was based on the fact that the two statutes hereinbefore quoted were aimed solely at discrimination. Actually the statutes needed no Guideline or Regulation to interpret them.

While Congress has authority to grant power to an administrative agency to prescribe rules and

regulations to administer a statute in order to carry into effect the will of Congress as expressed in the statute, that authority does not include the power to make law, because no such power can be delegated by Congress. The two statutes expressed nothing about a requirement for employers to accommodate the religious practices of its employees.

In *Manhattan Gen. Equip. Co. v. Commissioner*, 297 U.S. 129 (1936), the Supreme Court held:

The power of an administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end is *not the power to make law—for no such power can be delegated by Congress—but the power to adopt regulations to carry into effect the will of Congress as expressed by the statute. A regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity.* *Lynch v. Tilden Produce Co.*, 265 U.S. 315, 320-322; *Miller v. United States*, 294 U.S. 435, 439-440, and cases cited. And not only must a regulation, in order to be valid, be consistent with the statute, but it must be reasonable.

International Ry. Co. v. Davidson, 257 U.S. 506, 514. The original regulation as applied to a situation like that under review is both inconsistent with the statute and unreasonable. (Italics added) (*id.* at 134-135).

See also *M.E. Blatt Co. v. United States*, 305 U.S. 267 (1938); *Koshland v. Helvering*, 298 U.S. 441

(1936); *Commissioner v. General Mach. Corp.*, 95 F.2d 759 (6th Cir. 1938).

On March 24, 1972, nearly five years after the rights of the parties in the present case had accrued, Congress amended the Act to define religion. 42 U.S.C. § 2000e(j). This definition reads as follows:

The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

The subsequent enactment of § 2000e(j) in 1972 cannot be relied on to establish a Congressional intent with respect to the 1964 statute, which was not expressed in that statute.

As well stated by the Supreme Court in *Helvering v. Credit Alliance Corp.*, 316 U.S. 107, 112 (1942):

Section 115(h) was amended in 1938, subsequent to the consummation of the transaction here in question, to include money or property, but we cannot, as the Government suggests, read into the section, as it stood when the transaction took place, an intent derived

from the policy disclosed by the subsequent amendment.

In *Griggs v. Duke Power Co.*, 401 U.S. 424, 3 FEP Cases 175 (1971), Chief Justice Burger, who wrote the opinion for the Court, stated:

Congress did not intend by Title VII, however, to guarantee a job to every person regardless of qualifications. In short, the Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed. What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.

(Id. at 430-431, 3 FEP Cases at 177).

Griggs involved § 703(h) of the Act relating to tests and EEOC Guideline issued on August 24, 1966 interpreting that section to permit only the use of job related tests. The Supreme Court held that this regulation was a correct interpretation of the intent of Congress.

We do not read *Griggs* as requiring the appellant, in order to accommodate Reid, to suffer a

hardship, to hire two copyreaders when it needs only one, to require it to incur overtime expense of \$77 per day, or to require it to involuntarily assign other copyreaders who would have seniority over Reid, to substitute for him on Saturdays, thereby creating havoc and serious morale problems among its employees.

The judgment of the District Court in Appeal No. 74-1761, which denied attorneys' fees, is affirmed.

The judgment of the District Court in Appeal No. 74-1762, which awarded damages against the defendant, is reversed, and the case is remanded for dismissal of the complaint.

The proof establishes that a newspaper copy desk is a kind of reduction or selection department for news. Much more news comes to the paper through the wire services and through local sources than can be printed in the paper. The news that comes in includes world news, national news and local news. It is the duty of the News Editor to receive and review the news; edit it; determine what will be printed; check for punctuation; check for accuracy of fact; write head lines and sub-heads; make selection of news items or stories based upon various factors such as the nature of the news, the edition concerned, length of the story or item, and the like. The copy readers assist the News Editor in this task.

Copy readers sit at a horseshoe shaped desk. The News Editor, or person performing his function, sits at the middle of the desk and is called the slot man. The copy readers sit around the rim of the desk. As news comes in to the slot man he passes it to one of the copy readers for appropriate action.

Copy readers usually develop special abilities in addition to their general abilities, and normal operations require a crew of copy readers who possess expertise or experience in specific areas. Some of those specific areas or specialties at the Press-Scimitar are: the ability to perform as slot man; to handle telegraph, i.e. news arriving by wire; to handle Mid-South news; to handle society copy; to handle the magazine section, special features, makeup and markets.

The Press-Scimitar's normal complement of copy readers is ten, including the News Editor who mans the slot position when on duty.

The scheduling of the copy readers is done on a weekly basis by the News Editor subject to the approval of the Managing Editor. The scheduling is difficult for various reasons. First, the specialty requirement must be considered. While some copy readers possess more than one specialty, in addition to their general ability, none possess all of the specialties; and while some by additional training might acquire additional special skills, experience

has demonstrated that certain ones are more adapted by nature, and others less adapted by nature, to become proficient in special skills. Because of this need for special skills, all copy readers are not interchangeable with all other copyreaders.

The processing of the three editions published daily by the Press-Scimitar, Monday through Friday, requires copy readers' services during a period of time which may vary somewhat on different days but ranges from 5 o'clock A.M. to as late as 4:30 P.M. This range of time usually requires two different persons to man the slot position on days other than Saturday. The Saturday period ranges from 5:00 A.M. to about 1:30 P.M.

The length of a normal work day for a copy reader is eight hours. The copy desk work must be so scheduled as to have adequate manpower with proper specialties present during the entire copy desk operation period. Each copy reader gets an annual vacation of two, three or four weeks, depending upon his length of service. Timewise, about forty-six weeks of time go into vacations and holidays for the copy readers. Sickness takes about another eight weeks. With a normal complement of ten copy readers, including the News Editor, overtime work is required of copy readers from time to time in order to meet the manpower requirements on the copy desk.

Trial Exhibits 4 and 5 of the June 1973 hearing are copies of weekly schedules for the copy readers.

Trial Exhibit 4 is a May 1973 schedule and Trial Exhibit 5 is a collective exhibit of five weekly schedules in November and December 1967. These exhibits and testimony of the News Editor, Luther Southworth, show some of the problems of scheduling. However, they also reflect that there are regular variations from the desired normal situation and so called minimum standards. They also show that some copy readers are pulled off the copy desk for other editorial assignments, and on some occasions reporters are used as copy readers.

* * *

The proof shows that the News Editor intended to observe plaintiff's performance during a period of his adjustment to the job of copy reader at this particular paper in the light of all the duties to be performed by the available personnel. This is a process which would apply on the hiring of any new copy reader. Because the plaintiff was not hired, there is no way to determine how long it would have taken to discover what jobs the plaintiff was best suited for. However, the record clearly establishes that the plaintiff had sufficient skill and experience to successfully become one of the ten copy readers on the Press-Scimitar staff.

Proof was offered by the defendant that an alternative to manpower shortage would be to require overtime work from the available staff, at

time and one-half pay, or to employ an extra copy reader. However, the proof in this regard was not specific and the amount of the additional economic burden incident to such overtime or employment of extra personnel was not shown.

The defendant contends and offered opinion testimony from the executive personnel that if plaintiff had been employed by the defendant with all Saturdays guaranteed off, a serious morale problem would have been encountered. The proof shows two copy reader employees, Pinegar and Parker, who customarily work on Saturday, had requested to be scheduled so as to have Saturday off, but these were not for religious reasons. Their requests were refused. The proof shows that all copy readers, with the exception of the News Editor himself, are required to work from time to time on Saturday, in order to meet the manpower requirements which sometimes become critical due to factors of vacation, sickness and the fact that all copy readers are not interchangeable. However, the proof also shows that Saturday work is infrequent for some copy readers and there is a not too clearly defined rank hierarchy based upon the length of service and other factors. Presumably, the lower morale would result from resentment of the copy readers with more seniority who preferred to be off on Saturday for non-religious reasons, if the management sought to accommodate the plaintiff's religious practices. There is also

opinion testimony offered by the plaintiff from a former employee of the Press-Scimitar editorial department to the effect that plaintiff would overcome this resentment.

EDWARDS, Circuit Judge, dissenting:—In *Reid v. Memphis Publishing Co. (I)*, 468 F.2d 346, 5 FEP Cases 69 (6th Cir. 1972), this court upheld the applicability and constitutionality of an Equal Employment Opportunity Commission regulation, 29 C.F.R. § 1605.1 (1974), and remanded the case to the District Court for hearing and determinations of fact concerning "undue hardship."

No judge of the court filed any motion for reconsideration in banc.

On remand the District Judge reheard the case, made extensive findings of fact and entered judgment for the plaintiff. He held that defendant had made *no effort whatsoever to accommodate plaintiff Reid's religious beliefs*. His critical findings of fact were as follows:

Furthermore, it should be noted that one of the distinctions made by the Court of Appeals between the Dewey case and the instant case was that the employer had offered an accommodation to Dewey prior to his being discharged. *Reid v. Memphis Publishing Co.*, *supra*, at page 349. In the instant case the

defendant is unwilling to offer to anyone an accommodation in the form of being allowed to be off work on any day for religious purposes.

Having determined that a request for Saturday off for religious reasons is a reasonable accommodation, it is incumbent upon this Court to apply the facts of the case to the "undue hardship" test referred to in the E.E.O.C. regulation and the Court of Appeals remand.

The regulation specifies an example of § 1605.1(b) wherein it provides:

"Such undue hardship for example, may exist where the employee's needed work cannot be performed by another employee of substantially similar qualifications during the period of absence of the Sabbath observer."

This would indicate that an employer would be expected to assign other employees voluntarily or involuntarily to perform the work of the Sabbath observer, provided the accommodation meets the test of reasonableness and does not create an undue hardship otherwise.

In the instant case clearly there were other copy readers of substantially similar qualifications to perform the work to be done by the plaintiff during his observance of the Sabbath. Upon consideration of the proof pertaining to specific hardships, such as the scheduling of copy readers of particular experience, the possible effect of morale of other employees, and the possible economic burden caused by additional overtime, the Court concludes that

the defendant has not proven that an undue hardship would have rendered the required accommodation to the religious needs of the plaintiff unreasonable, particularly, in view of the fact that the defendant personnel did not make any attempt to accommodate the religious needs of the plaintiff.

While it is true that the plaintiff's lack of experience on this newspaper's staff and the then existing problems of scheduling would cause additional burdens, which might be considered a hardship for management personnel, the test is *undue* hardship, which this Court does not believe to be established by the proof.

The District Judge awarded plaintiff damages of \$7,349—the carefully computed difference between the salary Reid would have earned with defendant and what he actually did earn in the years before he secured a better paying job. He denied plaintiff's request for attorney fees.

Astonishingly, my colleagues now reverse the District Court's carefully considered judgment simply by accepting the defendant's contentions as to the facts. As I view the matter, the majority opinion retries this case on the written record, giving no weight to the great advantage the trial judge has in seeing, hearing and judging the credibility of the witnesses.

Additionally, the majority opinion has the effect of reversing the burden of proof which the regulation places upon the employer to establish undue hardship.¹

A full description of the case follows, including the bulk of the District Judge's opinion and findings of fact.

This case represents the second appeal in a continuing controversy between appellant Reid, a black member of the Seventh Day Adventist Church, and the company which publishes both the Memphis Press-Scimitar and the Commercial

1. For quite different reasons, both of my respected colleagues have deep-seated beliefs that the regulation at issue, 29 C.F.R. § 1605.1 (1974) (now enacted in the same words in statutory form, 42 U.S.C. § 2000e(j) (Supp. III, 1973)) is unconstitutional.

Judge Weick has expressed his concern that the regulation violates employer's constitutional rights in *Dewey v. Reynolds Metals Co.*, 429 F.2d 324, 331 n. 1, 334-35, 2 FEP Cases 687, 691, 870-871 (6th Cir. 1970), *aff'd* by an equally divided court, 402 U.S. 689, 3 FEP Cases 508 (1971). Judge Celebrezze has written strongly in dissent in *Cummins v. Parker Seal Co.*, 516 F.2d 544, 10 FEP Cases 974 (6th Cir. 1975) (A. Celebrezze, J., dissenting) (No. 74-1607, May 23, 1975, Slip Op. at 21-31), that the regulation (1605.1) is a violation of the establishment of religion clause of the First Amendment to the United States Constitution.

Neither of these constitutional arguments is frivolous and neither has been precisely dealt with by the United States Supreme Court. Each has, however, been rejected by a panel opinion of this court. See *Reid v. Memphis Publishing Co.*, *supra*; *Cummins v. Parker Seal Co.*, *supra*. In neither instance has there been a motion for rehearing in banc by any judge of this court.

Appeal. In the first appeal, *Reid v. Memphis Publishing Co.*, 468 F.2d 346, 5 FEP Cases 69 (6th Cir. 1972), we held, contrary to the view of the District Judge, that an Equal Employment Opportunity Commission regulation, 29 C.F.R. § 1605.1 (1974),² was applicable at the time Reid was

2. § 1605.1 Observation of the Sabbath and other religious holidays.

(a) Several complaints filed with the Commission have raised the question whether it is discrimination on account of religion to discharge or refuse to hire employees who regularly observe Friday evening and Saturday, or some other day of the week, as the Sabbath or who observe certain special religious holidays during the year and, as a consequence, do not work on such days.

(b) The Commission believes that the duty not to discriminate on religious grounds, required by section 703(a)(1) of the Civil Rights Act of 1964, includes an obligation on the part of the employer to make reasonable accommodations to the religious needs of employees and prospective employees where such accommodations can be made without undue hardship on the conduct of the employer's business. Such undue hardship, for example, may exist where the employee's needed work cannot be performed by another employee of substantially similar qualifications during the period of absence of the Sabbath observer.

(c) Because of the particularly sensitive nature of discharging or refusing to hire an employee or applicant on account of his religious beliefs, the employer has the burden of proving that an undue hardship renders the required accommodations to the religious needs of the employee unreasonable.

(d) The Commission will review each case on an individual basis in an effort to seek an equitable application of these guidelines to the variety of situations which arise due to the varied religious practices of the American people.

denied employment when he refused to work on Saturday due to his religious beliefs. The regulation in question requires employers to make "reasonable accommodations" to the religious needs of employees where such can be accomplished "without undue hardship."

By holding this regulation to be applicable, we distinguished this case from *Dewey v. Reynolds Metals Co.*, 429 F.2d 324, 2 FEP Cases 687, 869 (6th Cir. 1970), aff'd by an equally divided court, 402 U.S. 689, 3 FEP Cases 508 (1971), where this court's majority opinion had held that this same regulation was not applicable at the time of the discharge there complained of and that it was not retroactive in effect.

Subsequent to defendant's refusal to hire Reid in this case, but prior to our original case, the United States Congress amended Title VII so as to add to 42 U.S.C. § 2000e (1970), the following language:

(j) The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

Act of Mar. 24, 1972, Pub. L. No. 92-261, § 2, 86 Stat. 103, amending 42 U.S.C. § 2000e (1970) (codified at 42 U.S.C. § 2000e(j) (Supp. III, 1973)).

We noted in our opinion:

As shown in *Riley v. Bendix Corp.*, 464 F.2d 1113, 4 FEP Cases 951 (5th Cir. 1972) 4 E.P.D. § 7902, legislative history of this amendment stresses that the regulation (29 C.F.R. § 1605.1) did express the prior intention of Congress. This subsequent congressional affirmation strengthens our conclusion about the validity of the regulation.

Reid v. Memphis Publishing Co., 468 F.2d 346, 351, 5 FEP Cases 69, 72 (6th Cir. 1972).

On remand additional proofs were taken. Judge McRae there held on the crucial issue not only that the facts in the record did not disclose any "undue hardship" to the potential employer, but that defendant had made no effort whatever to accommodate Reid's religious beliefs. The District Judge reiterated a prior finding (made in the original case) that there was no intentional discrimination on the part of the defendant, but as indicated above, he awarded Reid \$7,349 in damages.

Plaintiff's appeal pertains solely to the disallowance of the attorney fees, while defendant contends that under the facts of its particular

business, no accommodation to Reid's religious objection to Saturday work was possible and, hence, that its failure to make any attempt to accommodate was irrelevant.

As to this last issue, Judge McRae's critical findings were:

Since this suit was filed plaintiff has gained other satisfactory employment and does not at this time seek to become employed by the defendant. The relief now sought is monetary damages only. The amount of damages sought is the difference between what plaintiff would have earned while working as a copy reader for the defendant and the pay he received until he took a position paying more than he would have earned as a copy reader for the defendant, and attorney's fees.

For clarity, the Court reiterates certain findings, namely, that the plaintiff was well qualified to become a copy reader for the defendant; that plaintiff was a member of the Seventh-Day Adventist Church; that one of the religious principles of the Seventh-Day Adventist Church is that its members should not work on Saturday; that plaintiff was offered the job as a copy reader on the Press-Scimitar on the condition that he make himself available to work on any day, including Saturday.

The record further establishes that the Memphis Press-Scimitar, the one of the defendant's two newspapers on which there was

an opening for a copy reader, publishes three editions Monday through Friday, two editions on Saturday and no editions on Sunday, and that the plaintiff declined to accept the position due to his sincere religious belief that he should not work on Saturday.

In accordance with the direction of the Court of Appeals Opinion, further evidence was offered on the employment practices of the Memphis Commercial Appeal, the other newspaper published by the defendant publishing company.

The proof shows that the Commercial Appeal had at the time in question two employees who were of the Seventh-Day Adventist faith and who were not required to work on Saturday. These employees were Lindley Richert and Glenn Allen. Richert was employed by the Commercial Appeal as a copy reader. The editor of the Commercial Appeal who employed Richert knew that Richert was a Seventh-Day Adventist and that he would not work on Saturday. However, since the Commercial Appeal publishes seven days per week it has need of copy readers seven days a week. Sunday was a less preferable work day for many of the copy readers; therefore, the editor employed Richert and assigned him to Sunday work on a regular basis with Saturday as one of his regular days off.

In the case of Allen, he had been an employee of the Commercial Appeal before he became a Seventh-Day Adventist. He worked in

the Commercial Appeal's library, which is staffed seven days a week. Allen customarily worked on Sunday and continued to work on Sunday after he became a Seventh-Day Adventist.

No changes in work schedules were required to be made by the Commercial Appeal, in order to accommodate Saturdays off for either Richert or Allen. On the contrary, their ready willingness to work on Sundays was well-suited to the Commercial Appeal's seven-day-per-week publishing requirement and was actually an accommodation to the newspaper.

At the supplemental evidentiary hearing the defendant offered further testimony pertaining to the duties of copy readers at the Memphis Press-Scimitar in an effort to meet the burden or proof cast upon it by the E.E.O.C. regulation determined to be applicable by the Court of Appeals, namely, that the accommodation of granting the plaintiff Saturday off would create an undue hardship on the newspaper.

The proof establishes that a newspaper copy desk is a kind of reduction or selection department for news. Much more news comes to the paper through the wire services and through local sources than can be printed in the paper. The news that comes in includes world news, national news and local news. It is the duty of the News Editor to receive and review the news; edit it; determine what will be printed; check for punctuation; check for accuracy of fact; write head lines and sub-heads; make selection of news items or stories based upon various factors

such as the nature of the news, the edition concerned, length of the story or item, and the like. The copy readers assist the News Editor in this task.

Copy readers sit at a horseshoe shaped desk. The News Editor, or person performing his function, sits at the middle of the desk and is called the slot man. The copy readers sit around the rim of the desk. As news comes in to the slot man he passes it to one of the copy readers for appropriate action.

Copy readers usually develop special abilities in addition to their general abilities, and normal operations require a crew of copy readers who possess expertise or experience in specific areas. Some of those specific areas or specialties at the Press-Scimitar are: the ability to perform as slot man; to handle telegraph, i.e. news arriving by wire; to handle Mid-South news; to handle society copy; to handle the magazine section; special features, makeup and markets.

The Press-Scimitar's normal complement of copy readers is ten, including the News Editor who mans the slot position when on duty.

The scheduling of the copy readers is done on a weekly basis by the News Editor subject to the approval of the Managing Editor. The scheduling is difficult for various reasons. First, the specialty requirement must be considered. While some copy readers possess more than one specialty, in addition to their general ability, none possess all of the specialties; and while

some by additional training might acquire additional special skills, experience has demonstrated that certain ones are more adapted by nature, and others less adapted by nature, to become proficient in special skills. Because of this need for special skills, all copy readers are not interchangeable with all other copy readers.

The processing of the three editions published daily by the Press-Scimitar, Monday through Friday, requires copy reader services during a period of time which may vary somewhat on different days but ranges from 5 o'clock A.M. to as late as 4:30 P.M. This range of time usually requires two different persons to man the slot position on days other than Saturday. The Saturday period ranges from 5:00 A.M. to about 1:30 P.M.

The length of a normal work day for a copy reader is eight hours. The copy desk work must be so scheduled as to have adequate manpower with proper specialties present during the entire copy desk operation period. Each copy reader gets an annual vacation of two, three or four weeks, depending upon his length of service. Timewise, about forty-six weeks of time go into vacations and holidays for the copy readers. Sickness takes about another eight weeks. With a normal complement of ten copy readers, including the News Editor, overtime work is required of copy readers from time to time in order to meet the manpower requirements on the copy desk.

Trial Exhibits 4 and 5 of the June 1973 hearing are copies of weekly schedules for the copy readers. Trial Exhibit 4 is a May, 1973 schedule and Trial Exhibit 5 is a collective exhibit of five weekly schedules in November and December 1967. These exhibits and testimony of the News Editor, Luther Southworth, show some of the problems of scheduling. However, they also reflect that there are regular variations from the desired normal situation and so called minimum standards. They also show that some copy readers are pulled off the copy desk for other editorial assignments, and on some occasions reporters are used as copy readers.

At the time plaintiff was being considered for the copy reader position, the Editor of the Press-Scimitar was planning to transfer George Lapides, one of the copy readers to another position, and he planned to put plaintiff, if employed into the position to be vacated by Lapides. It was customary for Lapides to work on Saturday.

The proof shows that the News Editor intended to observe plaintiff's performance during a period of his adjustment to the job of copy reader at this particular paper in the light of all the duties to be performed by the available personnel. This is a process which would apply on the hiring of any new copy

reader. Because the plaintiff was not hired, there is no way to determine how long it would have taken to discover what jobs the plaintiff was best suited for. However, the record clearly establishes that the plaintiff had sufficient skill and experience to successfully become one of the ten copy readers on the Press-Scimitar staff.

Proof was offered by the defendant that an alternative to manpower shortage would be to require overtime work from the available staff, at time and one-half pay, or to employ an extra copy reader. However, the proof in this regard was not specific and the amount of the additional economic burden incident to such overtime or employment of extra personnel was not shown.

The defendant contends and offered opinion testimony from the executive personnel that if plaintiff had been employed by the defendant with all Saturdays guaranteed off, a serious morale problem would have been encountered. The proof shows two copy reader employees, Pinegar and Parker, who customarily work on Saturday, had requested to be scheduled so as to have Saturday off, but these were not for religious reasons. Their requests were refused. The proof shows that all copy readers, with the exception of the News Editor himself, are required to work from time to time on Saturday, in order to meet the manpower requirements which sometimes become critical due to factors of vacation, sickness and the fact that all copy readers are not interchangeable. However, the proof also shows that Saturday

work is infrequent for some copy readers and there is a not too clearly defined rank hierarchy based upon the length of service and other factors. Presumably, the lower morale would result from resentment of the copy readers with more seniority who preferred to be off on Saturday for non-religious reasons, if the management sought to accommodate the plaintiff's religious practices. There is also opinion testimony offered by the plaintiff from a former employee of the Press-Scimitar editorial department to the effect that plaintiff would overcome this resentment.

The above noted proof addresses itself primarily to the "undue hardship" test which was offered alternatively in the event that the Court does not adopt a finding which supports the defendant's persistent position, namely, that granting a member of the editorial department of the Memphis Press-Scimitar a regular day off for religious purposes is contrary to the policy of the newspaper which is applied equally to all personnel.¹

By taking this position the defendant effectively contends that the plaintiff's request to be relieved from Saturday work would be beyond the scope of a "reasonable accommodation" of his religious practices. This Court

1. While there is no proof that any person who observes the Sabbath on Sunday has indicated unwillingness to do so on religious grounds, the customs and practices of the community and the newspaper permit the employees of the Memphis Press-Scimitar to be off on Sunday except in usual circumstances.

concludes that the request of the plaintiff to be relieved of Saturday work upon the basis of religious beliefs is within the scope of the "reasonable accommodation" test imposed by Congress and those authorized to promulgate E.E.O.C. regulation 1605.

Furthermore, it should be noted that one of the distinctions made by the Court of Appeals between the Dewey case and the instant case was that the employer had offered an accommodation to Dewey prior to his being discharged. *Reid v. Memphis Publishing Co.*, supra, at page 349. In the instant case the defendant is unwilling to offer to anyone an accommodation in the form of being allowed to be off work on any day for religious purposes.

Having determined that a request for Saturday off for religious reasons is a reasonable accommodation, it is incumbent upon this Court to apply the facts of the case to the "undue hardship" test referred to in the E.E.O.C. regulation and the Court of Appeals remand.

The regulation specifies an example in § 1605.1(b) wherein it provides:

"Such undue hardship for example, may exist where the employee's needed work cannot be performed by another employee of substantially similar qualifications during the period of absence of the Sabbath observer."

This would indicate that an employer would be expected to assign other employees voluntarily or involuntarily to perform the work

of the Sabbath observer, provided the accommodation meets the test of reasonableness and does not create an undue hardship otherwise.

In the instant case clearly there were other copy readers of substantially similar qualifications to perform the work to be done by the plaintiff during his observance of the Sabbath. Upon consideration of the proof pertaining to specific hardships, such as the scheduling of copy readers of particular experience, the possible effect of morale of other employees, and the possible economic burden caused by additional overtime, the Court concludes that the defendant has not proven that an undue hardship would have rendered the required accommodation to the religious needs of the plaintiff unreasonable, particularly, in view of the fact that the defendant personnel did not make any attempt to accommodate the religious needs of the plaintiff.

While it is true that the plaintiff's lack of experience on this newspaper's staff and the then existing problems of scheduling would cause additional burdens, which might be considered a hardship for management personnel, the test is *undue* hardship, which this Court does not believe to be established by the proof.

This Court has previously found that there was no intentional discrimination on the part of defendant personnel due to plaintiff's religion. Similarly, there is no proof that the executives of the defendant were aware of the obligations imposed upon them by the regulation at the

time of the refusal to hire. However, the opinion of the Court of Appeals in this case applied *Griggs v. Duke Power Company*, 401 U.S. 424, 3 FEP Cases 175 (1971) and quoted therefrom with regard to the principle that the Civil Rights Act of 1964 proscribes not only overt discrimination, but also practices that are fair in form, but discriminatory in operation. 468 F.2d at page 350. "... Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation." *Griggs v. Duke Power Co.*, supra, at page 432, 3 FEP Cases at page 178.

It must be remembered that Congress by the Civil Rights Act of 1964 recognized and established new statutory rights of employees in the areas of race, religion and sex. This imposed obligations on employers and, to some extent, employees to change some long standing policies and practices.

These findings of fact we review, of course, under the "clearly erroneous" standard. Fed. R. Civ. P. 52(a). Here the record shows that Saturday was the lightest work day of the six regularly scheduled work days. It does not show that accommodating Reid's religious beliefs would have occasioned any added expense of any kind to defendant, unless we assume that other employees would have refused Saturday assignments because Reid was exempted from them. There is no evidence which supports such an assumption because, as the District Judge

pointed out, defendant did nothing whatever to explore what it could do to accommodate Reid's religious beliefs. At a minimum, I believe the regulation here involved (now adopted by law) requires more than a simple assertion by an employer that it had always required Saturday availability and would not hire an employee who was not prepared to work on that day.

Furthermore, although the District Judge made no reference to it and placed no reliance upon it, this same employer through its other wholly-owned paper, the Memphis Commercial Appeal, operated a seven-day a week newspaper where Reid's ready availability for *Sunday* work would have been a distinct asset. Yet the record discloses no consideration at all by the employer of any possible exchange of personnel.

There may, of course, be situations where a prospective employee's unavailability for Saturday work would make his employment truly and undue hardship. A small newspaper which needed only on sports reporter could hardly hire a Seventh Day Adventist for that spot without "undue hardship." This case, however, presents no such facts. The District Judge's findings of fact are accurate and complete. They certainly are not "clearly erroneous." The judgment of the District Court as to damages should be affirmed.

As to plaintiff's appeal from denial of attorney fees, the case should be remanded for further

consideration. This is a Title VII action where Congress has squarely authorized attorney fees. 42 U.S.C. § 2000e-5(k) (1970); *Alyeska Pipeline Service Co. v. The Wilderness Society*, 43 LW 4561, 4568, 10 FEP Cases 826 (U.S. May 12, 1975).

~~MOTION FILED~~

In the Supreme Court of the United States
JAN 6 1976

OCTOBER TERM, 1975

No. 75-478

PARKER SEAL COMPANY,
Petitioner,

vs.

PAUL CUMMINS,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
SIXTH CIRCUIT

**MOTION OF TRANS WORLD AIRLINES, INC. FOR
LEAVE TO FILE BRIEF AMICUS CURIAE IN SUP-
PORT OF PARKER SEAL COMPANY'S PETITION
FOR A WRIT OF CERTIORARI**

DICK H. WOODS
GEORGE E. FELDMILLER
STINSON, MAG, THOMSON, McEVERS & FIZZELL
2100 TenMain Center
Kansas City, Missouri 64105
(816) 842-8600

Attorneys for Trans World Airlines, Inc.

Of Counsel:

RAYMOND R. FLETCHER, JR.
Vice President and General Counsel
JAMES J. MOLLENKAMP
Assistant General Counsel
Trans World Airlines, Inc.
Post Office Box 20126
Kansas City International Airport
Kansas City, Missouri 64195
(816) 891-7500

INDEX

Motion For Leave To File Brief <i>Amicus Curiae</i>	1
Brief <i>Amicus Curiae</i>	7
I. Opinions Below	7
II. Jurisdiction	8
III. Questions Presented	8
IV. Constitutional Provision, Statute and Regulations Involved	9
V. Statement of the Case	10
VI. Reasons for Granting the Writ	11
A. The decision below raises significant and recurring problems concerning the requirements of an employer to accommodate without undue hardship his employee's religious practices, especially in view of the December 16, 1975 decision of the Court of Appeals for the Eighth Circuit in <i>Hardison v. Trans World Airlines, Inc., et al.</i>	11
B. This Court should exercise its supervisory power to resolve the conflicts which cannot be harmonized among the Circuit Courts of Appeal	13
C. The statute and guideline violate the establishment clause of the First Amendment	14
VII. Conclusion	15

II

Table of Authorities Cited

CASES

<i>Cook v. Mountain States Telephone and Telegraph Company</i> , 397 F. Supp. 1217 (D. Ariz. 1975)	13
<i>Dawson v. Mizell</i> , 325 F. Supp. 511 (E.D. Va. 1971)	13
<i>Dewey v. Reynolds Metals Co.</i> , 429 F.2d 324, 334 (6th Cir. 1970), <i>aff'd</i> by an equally divided Court, 402 U.S. 689 (1971)	14
<i>Dixon v. Omaha Public Power District</i> , 385 F. Supp. 1382 (D. Neb. 1974)	13
<i>Hardison v. TWA, Inc., et al.</i> , 375 F. Supp. 877 (W.D. Mo. 1974), <i>rev'd</i> , December 16, 1975 by the Court of Appeals for the Eighth Circuit, F.2d (8th Cir. 1975)	2, 3, 4, 11, 12, 13, 14
<i>Johnson v. United States Postal Service</i> , 497 F.2d 128 (5th Cir. 1974)	13
<i>Reid v. Memphis Publishing Co.</i> , 521 F.2d 512 (6th Cir. 1975)	3, 13, 14
<i>Roberts v. Hermitage Cotton Mills</i> , 8 FEP 315 (D.C. S.C. 1974), <i>aff'd</i> , 8 FEP 319 (4th Cir. 1974)	3, 13
<i>Yott v. North American Rockwell Corporation</i> , 501 F.2d 398 (9th Cir. 1974)	11
<i>Young v. Southwestern Savings & Loan Association</i> , 509 F.2d 140 (5th Cir. 1975)	13
<i>United States v. City of Albuquerque, et al.</i> , 9 EPD 10,182 (D. N. Mex. 1975)	13

CONSTITUTIONAL PROVISION, STATUTES AND REGULATIONS

Constitution of the United States, Amendment I	9
29 C.F.R. § 1605.1 (1974)	10
Rule 52(a), Federal Rules of Civil Procedure	11

III

28 U.S.C. § 1254(1)	8
29 U.S.C. §§ 151 et seq. (National Labor Relations Act)	5, 12
42 U.S.C. §§ 2000e et seq. (Civil Rights Act of 1964)	3
42 U.S.C. § 2000e(j) (Supp. II, 1972)	9
42 U.S.C. § 2000e-2(a)(1) (1970)	10
42 U.S.C. § 2000e-2(h)	10, 13
45 U.S.C. §§ 151 et seq. (Railway Labor Act)	4-5, 12

OTHER AUTHORITIES

Edwards and Kaplan, <i>Religious Discrimination and the Role of Arbitration Under Title VII</i> , 69 Mich. L. Rev. 599, 628 (1971)	14
44 Fordham Law Review 442 (1975)	4, 14

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-478

PARKER SEAL COMPANY,
Petitioner,
vs.
PAUL CUMMINS,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
SIXTH CIRCUIT

**MOTION OF TRANS WORLD AIRLINES, INC. FOR
LEAVE TO FILE BRIEF AMICUS CURIAE IN SUP-
PORT OF PARKER SEAL COMPANY'S PETITION
FOR A WRIT OF CERTIORARI**

Trans World Airlines, Inc. ("TWA") moves for leave
to file the attached brief *amicus curiae* in support of
Parker Seal Company's ("Parker Seal") petition for a writ

of certiorari to the United States Court of Appeals for the Sixth Circuit.¹ Pursuant to Rule 42 of this Court, consent to the filing of the brief was requested of the parties. Counsel for Parker Seal has consented. Counsel for respondent stated that he would neither consent nor refuse to consent but would leave the matter to the discretion of the Court.

INTEREST OF THE AMICUS CURIAE

TWA is a corporation engaged in the transportation by air of persons, property and mail in interstate and foreign commerce. It has some 37,000 employees of which approximately 53% are covered by contracts with unions, including some 15,000 employees covered under TWA's collective bargaining agreement with the International Association of Machinists and Aerospace Workers.

As a carrier by air, TWA is subject to Title II of the Railway Labor Act, as amended, which gives employees the right to organize and bargain collectively through representatives of their own choosing and imposes upon air carriers and their employees the duty to use every reasonable effort to make and maintain agreements concerning rates of pay, rules and working conditions, and to settle by negotiation all disputes arising between them.

TWA's interest in this case is direct because it is party to *Hardison v. Trans World Airlines, Inc., et al.*, 375 F. Supp. 877 (W.D. Mo. 1974), reversed December 16, 1975

1. It is respectfully submitted that any question respecting the timeliness of this motion should be considered in light of the December 16, 1975 decision date of the Court of Appeals for the Eighth Circuit in *Hardison v. Trans World Airlines, Inc., et al.*, F.2d, reversing 375 F. Supp. 877 (W.D. Mo. 1974).

by the Court of Appeals for the Eighth Circuit.² The Eighth Circuit's decision in *Hardison* and the Sixth Circuit's opinion in *Parker Seal* are in direct conflict with the August 20, 1975 opinion of the Sixth Circuit in *Reid v. Memphis Publishing Company*, 521 F.2d 512 (6th Cir. 1975).³ TWA intends promptly to file in this Court a petition for a writ of certiorari for review of the December 16, 1975 decision of the Court of Appeals for the Eighth Circuit in *Hardison v. Trans World Airlines, Inc., et al.*

The exceptionally important questions posed by *Parker Seal* in its petition for a writ of certiorari as to what an employer must do to accommodate, without undue hardship, an employee's religious practices in order to satisfy the requirements of Title VII of the Civil Rights Act of 1964 (42 U.S.C. §§2000e et seq. (Supp. II, 1972)) and the regulations thereunder; whether a construction of the foregoing statute requiring an employer to accord preferential treatment to selected employees solely on the basis of their religious beliefs violates the establishment clause of the First Amendment and whether this Court will exercise its supervisory powers to resolve important and direct conflicts in opinions by different courts of appeal are matters of significant national concern. However,

2. The district court judgment in favor of certain defendant unions, International Association of Machinists and Aerospace Workers, International Association of Machinists and Aerospace Workers, District 142 and International Association of Machinists and Aerospace Workers, Local 1650, was upheld by the court of appeals because of *Hardison's* failure to effectively process an appeal against them.

3. A copy of the *Reid* opinion appears as Appendix G, page 63a to *Parker Seal's* petition. TWA respectfully submits that the decisions of the courts of appeal in *Parker Seal* and *Hardison* are also in direct conflict with the decision of the court of appeals for the Fifth Circuit in *Johnson v. United States Postal Service*, 497 F.2d 128 (5th Cir. 1974). See also *Roberts v. Hermitage Cotton Mills*, 8 FEP 315 (D.C. S.C. 1974), *aff'd* 8 FEP 319 (4th Cir. 1974).

Parker Seal does not include in its factual background a collective bargaining agreement containing non-discriminatory seniority clauses and other provisions establishing uniform work rules of the kind TWA and many other employers have.

Consequently, the Eighth Circuit's decision in *Hardison* gives rise to additional important questions involving whether an employer can be required under the Civil Rights Act and the establishment clause of the First Amendment to accommodate an employee's religious practices by (a) depriving, without union consent, more senior employees (who may or may not have any religious beliefs) of their seniority rights under a collective bargaining agreement that, by stipulation and court finding, was completely non-discriminatory against any religion; or (b) financing an employee's religious observances through payment of premium or overtime wages to a replacement. These questions ought to be resolved in the interest of uniform administration of significant legislation and the determination of constitutional questions of substantial import.⁴

TWA makes this motion for leave to file an *amicus curiae* brief to bring to the Court's attention the recently occurring conflict between decisions of the Sixth and Eighth Circuits involving accommodation of religious practices under Title VII of the Civil Rights Act of 1964 and additional important questions involving the relationship between that Act and religiously non-discriminatory provisions of collective bargaining agreements made pursuant to such statutes as the Railway Labor Act (45 U.S.C.

4. For a law review note on recent developments questioning the majority opinion and supporting Judge Celebrezze's dissent in *Parker Seal*, see 44 *Fordham Law Review* 442 (1975).

§§151 et seq.) and the National Labor Relations Act (29 U.S.C. §§151 et seq.)

Respectfully submitted,

DICK H. WOODS

GEORGE E. FELDMILLER

STINSON, MAG, THOMSON, McEVERS & FIZZELL

2100 TenMain Center

Kansas City, Missouri 64105

(816) 842-8600

Attorneys for Trans World Airlines, Inc.

Of Counsel:

RAYMOND R. FLETCHER, JR.

Vice President and General Counsel

JAMES J. MOLLENKAMP

Assistant General Counsel

Trans World Airlines, Inc.

Post Office Box 20126

Kansas City International Airport

Kansas City, Missouri 64195

(816) 891-7500

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-478

PARKER SEAL COMPANY,
Petitioner,

vs.

PAUL CUMMINS,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
SIXTH CIRCUIT

**BRIEF OF TRANS WORLD AIRLINES, INC. AS
AMICUS CURIAE IN SUPPORT OF PARKER SEAL
COMPANY'S PETITION FOR A WRIT
OF CERTIORARI**

Trans World Airlines, Inc. (hereinafter referred to as "TWA"), as *amicus curiae*, joins the Parker Seal Company, the petitioner (hereinafter referred to as "Parker Seal"), in praying that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered herein on May 23, 1975.

I. OPINIONS BELOW

The opinion of the court of appeals (Pet. App. D, page 13a) is reported at 516 F.2d 544. The opinion of the district court (Pet. App. B, p. 72) is unreported. The opinion of the Kentucky Commission on Human Rights (Pet. App. A, p. 1a) is unreported.

II. JURISDICTION

The judgment of the court of appeals was entered May 23, 1975. A timely petition for rehearing was denied by order entered July 18, 1975 (Pet. App. F, p. 61a). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

III. QUESTIONS PRESENTED

The following questions have been succinctly stated by Parker Seal:

1. Whether the court of appeals has improperly determined that an employer which tries, unsuccessfully, to accommodate an employee who refuses to work regularly scheduled Saturdays is barred from showing that its continued efforts impose undue hardship.

2. Whether, as construed and applied by the court of appeals, the foregoing statute and guideline, which require an employer to accord preferential treatment to selected employees solely on the basis of their religious beliefs, violate the establishment clause of the First Amendment.

3. Whether irreconcilable conflicts between varying panels of the court below under the statute and guideline here at issue call for the exercise of this Court's supervisory jurisdiction.

TWA respectfully submits that because of the widespread presence in industry throughout the nation of collective bargaining agreements containing seniority and other uniform work rules provisions, additional important questions inhere in such cases regarding what an employer and unions must do in their effort to reasonably accom-

modate the deviate religious practices of certain employees. One such additional question is whether an employer can be required under the Civil Rights Act and establishment clause of the First Amendment to accommodate an employee's religious practices by (a) depriving, without union consent, more senior employees (who may or may not have any religious beliefs) of their seniority rights under a bona fide collective bargaining agreement that is completely nondiscriminatory against any religion; or (b) financing an employee's religious observances through payment of premium or overtime wages to a replacement?

IV. CONSTITUTIONAL PROVISION, STATUTE AND REGULATIONS INVOLVED

The establishment clause of the First Amendment provides: "Congress shall make no law respecting an establishment of religion. . . ."

Section 701(j) of the Civil Rights Act of 1964, as amended, provides:

"The term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business." 42 U.S.C. § 2000e(j) (Supp. II, 1972).

Section 703(a)(1) of the Civil Rights Act of 1964, as amended, provides in pertinent part:

"It shall be an unlawful employment practice for an employer . . . to . . . discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions

or privileges of employment, because of such individual's . . . religion. . . ." 42 U.S.C. § 2000e-2(a)(1) (1970).

Section 703(h) of the Civil Rights Act of 1964, as amended, provides in pertinent part:

"Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply * * * different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system * * * provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex or national origin. * * *" 42 U.S.C. § 2000e-2(h)

Guideline 1605.1 of the United States Equal Employment Opportunity Commission provides in pertinent part:

"[S]ection 703(a)(1) of the Civil Rights Act of 1964 . . . includes an obligation on the part of the employer to make reasonable accommodations to the religious needs of employees and prospective employees where such accommodations can be made without undue hardship on the conduct of the employer's business.

"[T]he employer has the burden of proving that an undue hardship renders the required accommodations to the religious needs of the employee unreasonable." 29 C.F.R. § 1605.1 (1974).

V. STATEMENT OF THE CASE

This case is before the Court following extensive investigation and litigation before state and federal administrative agencies and the lower federal courts. The facts underlying petitioner's claim as well as a descriptive

history of the prior investigation and litigation are fully and amply set forth in the brief of Parker Seal. Significantly, the trier of facts in *Parker Seal* (both the Kentucky Commission on Human Rights and the district court) found in favor of Parker Seal.¹ *Parker Seal* does not, however, include in its factual background a collective bargaining agreement containing nondiscriminatory seniority clauses and other provisions establishing uniform work rules of the kind TWA and many other employers have entered into with unions.

VI. REASONS FOR GRANTING THE WRIT

A. The Decision Below Raises Significant and Recurring Problems Concerning the Requirements of an Employer to Accommodate Without Undue Hardship His Employee's Religious Practices, Especially in View of the December 16, 1975 Decision of the Court of Appeals for the Eighth Circuit in *Hardison v. Trans World Airlines, Inc., et al.*

Parker Seal presents this Court with the case of an employer who, once having accommodated an employee, was thereafter foreclosed from asserting that its accommodation efforts caused it undue hardship. The result of having all but written the "reasonable accommodation" rule out of the applicable law is that substantial on-going problems of nationwide impact in the administration of important federal statutory schemes such as the Railway

1. The propriety of a court of appeals substituting its views of the facts for those of the trier of facts in derogation of Rule 52(a) of the Federal Rules of Civil Procedure is a practice that ought not be indulged only when reasonable men could not differ. The Eighth Circuit in *Hardison* did not accept the findings of fact by the district court but substituted its own findings on the critical factual issues of the case. Cf. *Yott v. North American Rockwell Corporation*, 501 F.2d 398 (9th Cir. 1974).

Labor Act (45 U.S.C. 151, et seq.) and National Labor Relations Act (29 U.S.C. 151, et seq.) have been created. Those problems have recently surfaced in the December 16, 1975 decision of the United States Court of Appeals for the Eighth Circuit in *Hardison v. Trans World Airlines, Inc., et al.*, 375 F. Supp. 877 (W.D. Mo. 1974), *rev'd*, F.2d (8th Cir. 1975).

Briefly, TWA was able to initially accommodate Hardison's Friday sundown to Saturday sundown Sabbath requirement; however, Hardison thereafter transferred, to suit his own convenience, to a new shift where he knew he did not have sufficient seniority to avoid Saturday work. TWA continued its efforts to accommodate Hardison's religious practices but could not do so within the framework of the collective bargaining agreement. Hardison was the only person performing his essential job on the new shift and his seniority position would have required him to work on Saturdays. After Hardison was absent for several successive Saturdays and left early on a Friday shift, a discharge hearing was held under the collective bargaining agreement and Hardison was discharged. Hardison did not thereafter cooperate with his local union in its efforts to pursue grievance procedures in respect to his discharge.

After having the matter under advisement for 53 weeks, the Eighth Circuit reversed the district court. Preferential treatment was directed to be given Hardison solely on the basis of his religion even though such treatment would require TWA to pay overtime wages to other employees and cause other employees to give up their seniority rights.

The holdings in *Parker Seal* and *Hardison* result in it being well-nigh impossible for an employer with a large labor force to demonstrate any "undue hardship" in reason-

ably accommodating religious practices of its employees. The need to resolve the problems created by decisions in such cases as *Parker Seal* and *Hardison* is heightened by the innumerable and inevitable conflicts thrust upon the thousands of employers and unions across the country that are governed in their relations by collective bargaining agreements, which, in the language of 42 U.S.C. § 2000e-2(h), "... are not the result of an intention to discriminate because of ... religion...."

B. This Court Should Exercise Its Supervisory Power to Resolve the Conflicts Which Cannot Be Harmonized Among the Circuit Courts of Appeal.

The *Parker Seal* and *Hardison* decisions are in direct conflict with *Reid v. Memphis Publishing Co.*, 521 F.2d 512 (6th Cir. 1975). That conflict also encompasses an internal conflict within the Sixth Circuit. TWA believes that the courts of appeal decisions in *Parker Seal* and *Hardison* are also in direct conflict with the decisions of the courts of appeal for the Fourth and Fifth Circuits; see *Roberts v. Hermitage Cotton Mills*, 8 FEP 315 (D.C. S.C. 1974), *aff'd*, 8 FEP 319 (4th Cir. 1974) and *Johnson v. United States Postal Service*, 497 F.2d 128 (5th Cir. 1974). See also *Dawson v. Mizell*, 325 F. Supp. 511 (E.D. Va. 1971).

TWA respectfully submits that such conflicts should be resolved by this Court before they spawn judicial error and needless litigation for years to come in regard to important statutory and constitutional questions.²

2. The opinion by the district court (Oliver, J.) in *Hardison* has been cited with approval and followed in *Dixon v. Omaha Public Power District*, 385 F. Supp. 1382 (D. Neb. 1974); *United States v. City of Albuquerque, et al.*, 9 EPD 10,182 (D. N. Mex. 1975); *Young v. Southwestern Savings & Loan Association*, 509 F.2d 140 (5th Cir. 1975) and *Cook v. Mountain States Telephone and Telegraph Company*, 397 F. Supp. 1217 (D. Ariz. 1975).

C. The Statute and Guideline Violate the Establishment Clause of the First Amendment.

The importance and substantial character of the statutory and constitutional issues presented by *Parker Seal* are recognized in the cases and law review articles dealing with the religious discrimination aspects of Title VII of the Civil Rights Act. Commencing with *Dewey v. Reynolds Metals Co.*, 429 F.2d 324, 334 (6th Cir. 1970), *aff'd* by an equally divided court, 402 U.S. 689 (1971) "grave constitutional questions" were raised regarding violation of the establishment clause of the First Amendment. Distinguished legal scholars have asserted that a construction of Title VII of the Civil Rights Act in the circumstances presented by *Parker Seal* and *Hardison* would constitute a violation of the establishment clause of the First Amendment. See Edwards and Kaplan, *Religious Discrimination and the Role of Arbitration Under Title VII*, 69 Mich. L. Rev. 599, 628 (1971).

The importance of the constitutional questions presented is set forth by Judge Celebrezze's dissent in *Parker Seal*. Significantly, a current law review note on recent developments in 44 Fordham Law Review 442 (1975) questions the approach of *Parker Seal*'s two-judge majority and supports the rationale of Judge Celebrezze's dissent.

The Eighth Circuit in *Hardison* commenced its decision by stating that the appeal presented "important questions". The court of appeals also admitted that TWA's position that it is constitutionally impermissible for a government to enforce accommodation of religious beliefs in a manner that results in privileges not available to a nonbeliever, or which result in inconvenience to the nonbeliever, is "not without articulate support".³

3. See also the dissent of Judge Lumbard in *Reid v. Memphis Publishing Co.*, *supra*, page 524 n.1.

VII. CONCLUSION

For these reasons a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Sixth Circuit.

Respectfully submitted,

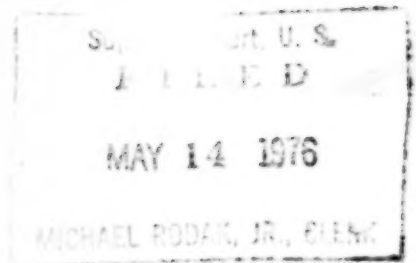
DICK H. WOODS
 GEORGE E. FELDMILLER
 STINSON, MAG, THOMSON, McEVERS & FIZZELL
 2100 TenMain Center
 Kansas City, Missouri 64105
 (816) 842-8600

Attorneys for Trans World Airlines, Inc.

Of Counsel:

RAYMOND R. FLETCHER, JR.
 Vice President and General Counsel

JAMES J. MOLLENKAMP
 Assistant General Counsel
 Trans World Airlines, Inc.
 Post Office Box 20126
 Kansas City International Airport
 Kansas City, Missouri 64195
 (816) 891-7500



APPENDIX

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

NO. 75-478

PARKER SEAL COMPANY, *Petitioner*

- v -

PAUL CUMMINS, *Respondent*

On Writ of Certiorari to the United States
Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI
FILED SEPTEMBER 25, 1975
WRIT OF CERTIORARI
GRANTED MARCH 1, 1976

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

NO. 75-478

PARKER SEAL COMPANY, Petitioner

- v -

PAUL CUMMINS, Respondent

On Writ of Certiorari to the United States
Court of Appeals for the Sixth Circuit

INDEX TO APPENDIX

	Page
Chronological List of Relevant Docket Entries . . .	iii
Complaint (District Court)	1
Answer (District Court)	12
Transcript of Hearing Before Kentucky Commission on Human Rights	21

INDEX TO APPENDIX (Continued)

	Page
Findings of Fact, Conclusions of Law and Order of Kentucky Commission on Human Rights	Pet. 1a
Joint Motion to the District Court to Submit Action for Trial and Determination on the Record	242
Order of the District Court that Action be Submitted for Trial and Determination on the Record	244
Memorandum Opinion of the District Court	Pet. 7a
Judgment of the District Court	Pet. 11a
Opinion of the Court of Appeals	Pet. 13a
Judgment of the Court of Appeals	Pet. 59a
Order of the Court of Appeals Denying Petition for Rehearing	Pet. 61a
Order of Supreme Court granting petition for writ of certiorari	246

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON DIVISION

Paul Cummins vs. Parker Seal Co.

DATE	PROCEEDINGS
9-26-72	Complaint with Prayer for permanent injunction, filed; summons and 1 copy issued and delivered to Marshal.
10-4-72	ORDER signed & filed 10-3-72 ent: At call of docket 10-2-72 case continued until further orders. Copies as noted.
10-5-72	Summons with Marshal's return filed, executed 9-28-72
10-12-72	Answer filed
12-26-72	Stipulation of Facts filed by parties w/ exhibits.
12-26-72	Defendant's Motion for Leave to File Exhibits filed.
1-15-73	Joint Motion of Parties to Submit Action to Court for Determination on record and for time to file briefs filed.
1-26-73	ORDER signed & filed 1-24-73 ent: Defendant having moved court for permission to file certain exhibits ordered said motion

DATE	PROCEEDINGS
	be sustained and exhibits tendered are hereby filed. Copies as noted.
1-26-73	ORDER signed & filed 1-24-73 ent: Parties having filed Joint Motion to submit for trial and determination on the record ordered that action be submitted on record; plaintiff given 45 days to submit brief and defendant given 45 days thereafter to file its brief; at expiration of time for filing briefs record to stand submitted. Copies as noted.
3-14-73	Plff's Brief TENDERED.
4-18-73	Defendant's Brief filed.
5-1-73	ORDER signed & filed 4-30-73 ent: At call of docket on 4-23-73 ordered that plaintiff's brief tendered on 3-14-73 be filed and case continued until further orders. Copies as noted.
3-20-74	Memorandum Opinion of Court filed.
3-20-74	JUDGMENT filed and entered: Ordered and Adjudged that plff's complaint be dismissed; judgment entered in favor of deft; deft's Motion for Allowance of attorney's fee overruled; deft. recover of plff. properly taxable costs herein. Copies as noted with Notice of Entry.

DATE	PROCEEDINGS
4-10-74	Plaintiff's Notice of Appeal filed. Copy as noted
4-10-74	Appeal Bond filed.
5-16-74	Record forwarded to 6CCA
6-5-74	Acknowledgment by 6CCA of receipt of record filed, Their No. 74-1607
6-4-74	<i>Certified record</i> (1 vol pleadings) filed; and cause docketed
6-7-74	Appearance of counsel for Appellant
6-10-74	Appearance of counsel for Appellee
6-12-74	Appearance of counsel for Appellant
7-26-74	Motion of Appellant for leave to file 8-1/2 x 13 size appendix (Granted)
7-26-74	Motion of Appellee to dismiss appeal (Denied 8/9/74 — Peck, J.)
7-29-74	Twenty-five copies of Brief for Appellant, with proof of service
7-30-74	Motion: Appellee's brief until 30 days after Appellant files a proper brief (Denied. Brief to be submitted not later than 9/5/74)
8-1-74	Supplement to Appellee's motion to dismiss

DATE	PROCEEDINGS
8-6-74	Designation of record for appendix
8-16-74	Motion: Appellee's brief 25 days from and after such time as the Appellant files a proper appendix herein (denied)
8-16-74	Ten copies of Appendix
9-5-74	Twenty-five copies of Brief for Appellee, with proof of service
10-1-74	Twenty-five copies of Reply Brief for Appellant, with proof of service
12-12-74	Cause argued and submitted (Before: Phillips, Celebrezze and McCree, JJ.) [Thomas L. Hogan argued for Appellant; Bennett Clark argued for Appellee] GG-5
5-23-75	Judgment of the District Court reversed and the case is remanded for further proceedings JJ-3
5-23-75	Opinion by Phillips, J. [Celebrezze, J., dissenting]
6-4-75	Twenty-five copies of Brief for Rehearing with suggestion for Rehearing in banc
6-5-75	Appellant's bill of costs, with proof of service

DATE	PROCEEDINGS
7-18-75	Order denying petition for rehearing with suggestion for rehearing in banc (Phillips, J.) [Celebrezze, J., dissenting] KK-4
7-22-75	Motion of Appellee for stay of mandate pending application to Supreme Court for a writ of certiorari
8-1-75	Order staying mandate thirty days (Phillips, J.) LL-1
8-26-75	Motion for additional stay of mandate pending application to Supreme Court for a writ of certiorari (Granted. Phillips, J.)
9-18-75	Motion of Appellee for a further stay of mandate to 9/27/75 (Motion Granted. Phillips, J.)
10-6-75	Notice of filing petition for certiorari 9/25/-75 (Sup.Ct.No. 75-478)
3-8-76	Certified copy of order of Supreme Court granting certiorari 3/1/76
3-22-76	Letter requesting transmittal of record to Supreme Court
3-25-76	Record for certiorari application mailed to Supreme Court

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON DIVISION

PAUL CUMMINS, PLAINTIFF

V.

PARKER SEAL COMPANY,
A Division of Parker
Hannifin Corporation, DEFENDANT

CIVIL ACTION NO. _____

COMPLAINT

1. The jurisdiction of this Court over the complaint arises pursuant to Section 706 (f) of the 1964 Civil Rights Act, 42 U.S.C. § 2000 e-5(f), and pursuant to 28 U.S.C. § 1331 (a) and 1343(3).

2. Plaintiff, Paul Cummins, is a citizen of the United States and the Commonwealth of Kentucky and resides in Mount Vernon, Kentucky. He was employed by the Defendant on December 9, 1958 and was discharged on September 3, 1971.

3. Defendant, Parker Seal Company, a Division of Parker-Hannifin Corporation, is a corporation and is qualified and is doing business in Kentucky.

4. Plaintiff is a member of the World Wide Church of God. He began attending this Church in April, 1969 and joined the church in September, 1970. This Church observes the period from sunset Friday to sunset Saturday as the Sabbath and its members honor this period by abstaining from their weekly labors and by attending religious services. This procedure is also adhered to on certain designated "Feast Days of God."

5. In July, 1970 Plaintiff informed Defendant that for religious reasons he could not longer work on his Sabbath and feast days. He advised the company that he was willing to accept a transfer or work any other scheduled or unscheduled time to make up for the time he might lose.

6. Defendant accommodated Plaintiff's religious needs by allowing him to be absent from work on his Sabbath and feast days. This accommodation began in April, 1969 and ended with Plaintiff's discharge on September 3, 1971.

7. Defendant demanded that Plaintiff work on his Sabbath or change his religion. When Plaintiff did neither, he was fired.

8. Defendant has discriminated against Plaintiff because of his religion.

9. On September 21, 1971, Plaintiff filed a charge of discrimination on the basis of religion with the United States Equal Employment Opportunity Com-

mission against Defendant. This charge was amended on June 30, 1972 (Copies are attached hereto.).

10. Plaintiff has exhausted the administrative remedies set forth in 42 U.S.C. § 2000 e-5, said remedies have proved unavailing, and permanent injunctive relief by this Court is now appropriate against Defendant. A copy of the right to sue letter issued to Plaintiff by the Equal Employment Opportunity Commission is attached hereto.

11. Plaintiff has no plain, adequate or complete remedy to redress the wrongs alleged and this suit is the only available means of securing relief. Plaintiff is now suffering and will continue to suffer irreparable injury if no relief is granted against Defendant's unlawful acts and practices as set forth herein.

WHEREFORE, Plaintiff demands:

1) That the Court advance this matter on its docket, order a speedy hearing at the earliest practicable date and cause this case to be in every way expedited.

2) That the Court declare that Defendant's policy of refusing to accommodate Plaintiff's religious beliefs is violative of federal law.

3) That a permanent injunction issue, restraining Defendant, its officers, agents and employees, and all others acting in concert with them from:

- (a) Discriminating against Plaintiff, directly or indirectly, because of religion
 - (b) Refusing to reasonably accommodate Plaintiff's religious beliefs.
- 4) That a permanent injunction issue, directing Defendant to:
- (a) Reinstate Plaintiff with all benefits, including but not limited to, back pay, increase in remuneration, vacation rights, sick leave and pension rights to which he would have been entitled had he not been wrongfully discharged.
 - (b) Reasonably accommodate, without undue hardship, the religious beliefs of Plaintiff by allowing him to abstain from working on his Sabbath or feast days.
- 5) That the Court grant Plaintiff such affirmative relief as may be appropriate to carry out the public policy as set forth in the 1964 Civil Rights Act, 42 U.S.C. §2000 e, *et seq.*
- 6) That the Court allow plaintiff his costs herein, including reasonable attorney's fees in accordance with 42 U.S.C. § 2000 3-5 (k).
- 7) That the Court grant all other relief to which the Plaintiff appears to be entitled.

JAMES C. HICKEY
EWEN, MACKENZIE AND
PEDEN

2100 Commonwealth Building
Louisville, Kentucky 40202

THOMAS L. HOGAN
205 South Fourth Street
Louisville, Kentucky 40202
583-0972

Attorneys for Plaintiff

BY: /s/ Thomas C. Hogan

* * * * *

SEP 20, 1971

The Equal Employment
Opp. Commission
1800 G. Street N.W.
Washington, D.C. 20506

Mt. Vernon, Ky.
Sept. 15, 1971

Sirs: I have worked for *Parker Seal Co., Berea, Ky.*
for past 12 years & 8 mos.

About 2 yrs. ago I started observing the Sabbath,
every thing was OK with my company.

Just recently I was told either work on the Sabbath
or else, I refused & was fired.

Can you please tell me if this is discrimination & if
so what can I do about it.

Thanks
Paul Cummins
Mt. Vernon, Ky.
40456

RECEIVED
E.E.O.C.
CL. REG. OFFICE
SEP 21 1971

AM PM
7.8.9.10.11.12.1.2.3.4.5.6

* * * * *

(If you have a complaint, fill in this form, and mail
it to the Equal Employment Opportunity Commis-
sion's Regional Office in your area. In most cases,
a charge must be filed with the EEOC within a
specified time after the discriminatory act took
place. IT IS THEREFORE IMPORTANT TO FILE
YOUR CHARGE AS SOON AS POSSIBLE.

This form is to be used only to file a charge of
discrimination based on RACE, COLOR, RE-
LIGION, SEX, or NATIONAL ORIGIN.

(PLEASE PRINT OR TYPE)

Case File No. TME2-0208

1. Your Name (Mr.) Paul Cummins Phone
Number 256-2326 Street Address P. O. Box 85
City Mt. Vernon State Kentucky
Zip Code 40456

2. WAS THE DISCRIMINATION BECAUSE
OF: (Please check one)

Race or Color ☐ Religious Creed ☒
National Origin ☐ Sex ☐

3. Who discriminated against you? Give the
name and address of the employer, labor organiza-
tion, employment agency and/or apprenticeship com-
mittee. If more than one, list all.

Name Parker Seal Company, Division of
Parker-Hannifin Corporation

Street address Lewis and Maple Streets
City Berea State Kentucky

Zip Code 40303

AND (other parties if any) _____

4. Have you filed this charge with a state or local government agency?

Yes ☒ When 10 1 71 No ☐

5. If your charge is against a company or a union, how many employees or members?

Under 25 ☐ Over 25 ☒

6. The most recent date on which this discrimination took place: Month September
Day 3 Year 1971

7. Explain what unfair thing was done to you. How were other persons treated differently? (Use extra sheet if necessary.)

I had worked for Parker Seal Company for 12 years and 8 months prior to my discharge on September 3, 1971. Approximately two years before my discharge, I affiliated with the World Wide Church of God and following their religious tenets which included abstention from common labor on the Sabbath. The Sabbath is the period from sundown Friday to sundown Saturday.

The Company accommodated my religious beliefs for this two year period. Then in August of 1971, the plant manager informed me that the Company would no longer accommodate me and

ordered me to be available for work on my Sabbath. I refused and on September 3, 1971, I was terminated for so refusing. I charge this termination constitutes religious discrimination.

8. I swear or affirm that I have read the above charge and that it is true to the best of knowledge, information and belief.

Date 28 June 1972 /s/ Paul Cummins

Subscribed and sworn to before me this 28th day of June 1972

/s/ Robert E. Robinson

Robert E. Robinson

My Commission Expires 19 May 1975
Notary Public

If it is difficult for you to get a Notary Public to sign this, sign your own name and mail to the Regional Office. The Commission will help you to get the form sworn to.

FORM APP.: BUR. OF BUDGET—No. 124-R001

FORM EEOC-5 (REV. 7-)

* * * * *

AREA CODE 901
534-3591

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION
46 North Third Street, Suite 1004
Memphis, Tennessee 38103

DISTRICT OFFICE

Charge No. TME2-0208

Mr. Paul Cummins		Parker Seal Company
P. O. Box 85	vs.	Division of Parker-
Mt. Vernon, Kentucky		Hannifin Corporation
		Lewis and Maple Streets
		Berea, Kentucky

NOTICE OF RIGHT TO SUE
WITHIN 90 DAYS

Pursuant to Section 706(f)(1) of Title VII of the Civil Rights Act of 1964, as amended, you are hereby notified that you may within ninety (90) days of receipt of this communication, institute a civil action in the appropriate Federal District Court. If you are unable to retain an attorney, the Federal District Court is authorized in its discretion to appoint an attorney to represent you and to authorize commencement of the suit without payment of fees, costs or security. If you decide to institute suit and find you need assistance, you may take this letter,

along with any correspondence you have received from the Commission to the Clerk of the Federal District Court nearest to the place where the alleged discrimination occurred, and request that a Federal District Judge appoint counsel to represent you. Should you decide to sue, please have your attorney complete the enclosed post card as soon as possible.

<u>/s/ Charles A. Dixon</u>	<u>SEP 5 1972</u>
Charles A. Dixon	Date
Director	

Enclosure

CERTIFIED MAIL — RETURN
RECEIPT REQUESTED

* * * * *

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON DIVISION

PAUL CUMMINS, PLAINTIFF

VS. ANSWER

PARKER SEAL COMPANY,
A Division of Parker
Hannifin Corporation DEFENDANT

CIVIL ACTION NO. 2432

* * * * *

Comes the defendant, Parker Seal Company,
and for its Answer to the Complaint of the plaintiff,
Paul Cummins, states as follows:

FIRST DEFENSE

The defendant, Parker Seal Company, admits so much of paragraph 2 of the plaintiff's complaint as alleges that the plaintiff was employed by the defendant on December 9, 1958 and terminated his employment with the defendant on September 3, 1971, and the defendant admits the allegations contained in paragraph 3 of the plaintiff's complaint.

SECOND DEFENSE

The defendant, Parker Seal Company, states that it is without sufficient knowledge or information to form a belief as to the truth of the allegations set forth in the first sentence of the second paragraph of the plaintiff's complaint or in paragraphs 4, 6, and 9 of the plaintiff's complaint.

THIRD DEFENSE

The defendant, Parker Seal Company, denies each and every allegation stated or implied in paragraphs 1, 5, 7, 8, 10, and 11 of the plaintiff's complaint and denies each and every other allegation contained in the plaintiff's complaint not specifically mentioned in the First Defense and Second Defense contained hereinabove.

FOURTH DEFENSE

The complaint of the plaintiff fails to state a claim on which relief may be granted.

FIFTH DEFENSE

The plaintiff herein, in an action styled identically to the within styled action and while represented by competent legal counsel, filed a complaint of discrimination with the Kentucky Commission on Human Rights identical in substance to the allegations set forth in the plaintiff's

complaint herein; thereafter the plaintiff's complaint of discrimination was tried in a full evidentiary proceeding before the Kentucky Commission on Human Rights at which hearing witnesses were called on behalf of the plaintiff and testified under oath; thereafter briefs were submitted by counsel on behalf of the plaintiff and the defendant; thereafter the Kentucky Commission on Human Rights acting through its duly constituted chairman rendered its Finding of Fact, Conclusions of Law and Order on April 12, 1971, a copy of which is annexed hereto and made a part hereof as Exhibit A; said order dismissing the complaint against this defendant and finding that the defendant, Parker Seal Company, had not discriminated against the plaintiff and further finding that to require the defendant to accommodate the religious beliefs and practices of the plaintiff would work an undue hardship on this defendant, and said Order became final on May 12, 1971; and the parties to the within action are identical and in identical postures and the law sought to be applied herein is identical to that applied in the matter before the Kentucky Commission on Human Rights and the plaintiff herein makes no claim and seeks no relief not available to him or previously sought in the aforesaid action before the Kentucky Commission on Human Rights and the state remedy in the prior action was identical to and as fully adequate as the Federal

remedy sought to be applied herein, the remedy provided for the plaintiff by the Kentucky Civil Rights Acts, KRS 344.010 Et. Seq., a copy of which is annexed as Exhibit "B" were employed by the plaintiff and produced speedy results, and for these reasons this Court must apply the rule of res judicata and/or collateral estoppel and/or issue preclusion to the final order of the Kentucky Commission on Human Rights and the plaintiff's claim herein is barred and this Court must dismiss and hold for naught the complaint of the plaintiff herein.

SIXTH DEFENSE

The defendant, Parker Seal Company, reaffirms and reiterates the allegations contained in Defense No. 5 hereinabove and states that this Court must give Full Faith and Credit to the Findings of Fact, Conclusions of law and Order of the Kentucky Commission on Human Rights, as contained in Exhibit A hereto.

SEVENTH DEFENSE

The defendant, Parker Seal Company, states that so much of the 1964 Civil Rights Act, as amended, 42 U.S.C. Section 2000e Et. Seq., and other Federal statutes and administrative decisions and regulations upon which plaintiff relies and claims and seeks to enforce against the defendant herein,

which Act or Statute or Decision or Regulation requires that the defendant, Parker Seal Company, accommodate the plaintiff's religious beliefs and practices are unconstitutional, null and void as applied to this defendant for the reason that the said Act, Statutes, Decisions and Regulations have no secular purpose and/or have as its or their primary purpose and/or effect the advancement and support of religion in general, and the advancement and support of the religious sect and tenets and dogmas of the religious faith or denomination of the plaintiff in particular; and/or enforcement and/or application against this defendant of the Act, Statutes or Decisions or Regulations under which the plaintiff claims will foster, encourage, and require extensive and excessive involvement, control and supervision by the United States, its agents and employees in and with religion in general, and in and with the religious sect, tenets and dogma of the religious faith or denomination to which the plaintiff adheres, in particular, and the application and enforcement of the said Act, Statute, Decision or Regulation against this defendant will have the direct effect of injuriously affecting the manufacturing business of the defendant.

EIGHTH DEFENSE

So much of the 1964 Civil Rights Act, as amended, 42 U.S.C. Section 2000e Et. Seq., under

which the plaintiff is making claim herein, is unconstitutional and null and void for the reason that said Act violates Article I, Section 9 of the Constitution of the United States in that said Act is or has the effect of an ex post facto law passed by Congress, and the application and enforcement of the said Act against this defendant will have the direct effect of injuriously affecting the manufacturing business of the defendant.

NINTH DEFENSE

So much of the 1964 Civil Rights Act, as amended, 42 U.S.C. Section 2000e Et. Seq., under which the plaintiff is making claim herein, is unconstitutional and null and void for the reason that that portion of the said Act under which the plaintiff is claiming is too vague and ambiguous to meet the Constitutional requirement of due process of law, as applied to this defendant, and the application and enforcement of the said Act against this defendant will have the direct effect of injuriously affecting the manufacturing business of the defendant.

TENTH DEFENSE

So much of the 1964 Civil Rights Act, as amended, 42 U.S.C. Section 2000e Et. Seq., as the plaintiff is making claim under herein, is arbitrary and unreasonably discriminatory for the reason that it violates the equal protection, uniformity and due

process of law requirements of the Constitution of the United States, as applied to this defendant.

ELEVENTH DEFENSE

The defendant, Parker Seal Company, specifically denies that it, at any time, has ever discriminated against the plaintiff, Paul Cummins, on account of his religion, or for any other reason and this defendant further specifically denies that it is under any obligation to discriminate in favor of the plaintiff, Paul Cummins, which would include making accommodation for the plaintiff because of the plaintiff's religion or to assist the plaintiff in the practice of his religion, and application of the Civil Rights Act of 1964, as amended, 42, U.S.C. 2000e Et. Seq., as demanded herein, would work an undue hardship on the conduct of the plaintiff's business.

WHEREFORE, the defendant, Parker Seal Company, demands:

1. That the complaint of the plaintiff be dismissed and held for naught:

2. That the Court declare so much of the Civil Rights Act of 1964, as amended, and any other Federal Statutes, Decisions and Regulations which require that the defendant discriminate in favor of the plaintiff in employing the plaintiff and making work assignments because of the plaintiff's religion under which this plaintiff is claiming against this defendant

to be in violation of the Constitution of the United States and null and void and unenforcible against the defendant, Parker Seal Company;

3. That the Court allow the defendant its costs expended herein, including reasonable attorneys fees in accordance with the provisions of the 1964 Civil Rights Act, 42 U.S.C. Section 2000e-5 (k);

4. That the Court grant the defendant, Parker Seal Company, all other relief to which the defendant appears to be entitled.

STOLL, KEENON & PARK
310 First National Bank Bldg.
Lexington, Kentucky 40507

BY /s/ Bennett Clark
Attorneys for Defendant,
Parker Seal Company

This is to certify that the within Answer has been served upon the plaintiff by mailing a true copy to his attorneys of record, Mr. James C. Hickey, Ewen, MacKenzie & Peden, 2100 Commonwealth Bldg., Louisville, Kentucky 40202, and Mr. Thomas

L. Hogan, 205 South Fourth Street, Louisville,
Kentucky 40202, on this the 12 day of October, 1972.

BY /s/ Bennett Clark
Attorney for Defendant,
Parker Seal Company

* * * * *

[1]

COMMONWEALTH OF KENTUCKY
BEFORE THE KENTUCKY COMMISSION
ON HUMAN RIGHTS
Complaint No. 231-E

PAUL CUMMINS COMPLAINANT

VS: HEARING

PARKER SEAL COMPANY, DIVISION
OF PARKER-HANNIFIN
CORPORATION RESPONDENT

* * * * *

The hearing in the above-styled matter was held before the Kentucky Commission on Human Rights on Friday, March 3, 1972, at the Madison County Courthouse, Community Room, Richmond, Kentucky, beginning at the hour of 12:30 P.M., before me, Betty J. Dobson, Notary Public, State of Kentucky at Large.

PRESIDING HEARING COMMISSIONER: Mr.
James A. Crumlin

Commission Members: Mrs. Irving Rosenbaum
Mrs. Belle Smith
Mr. Fred Anhouse

Mr. E. P. Wilson
 Mr. Vernon Johnson
 Mr. A. R. Lasley
 Rev. C. L. Finch

APPEARANCES:

Mr. Thomas L. Hogan
 Attorney for the Complainant
 Stoll, Kennon & Park
 Mr. Bennett Clark
 Appearing,
 Attorney for the Respondent

[2]

INDEX

WITNESS

PAGE

FOR THE COMPLAINANT:

Kelly H. Barfield	19— 36
Paul Cummins	36—102
Conley Saylor	104—129
Oscar Fain	129—140
Chester Webb	141—155
Bobby Abrams	156—163
L. G. Haddock	164—201

FOR THE RESPONDENT:

Roy Kuhn	203—234
----------	---------

Certificate

[3]

MR. BENNETT CLARK: Your Honor, before the hearing opens I would like to ask that there be a separation of witnesses that are to testify.

MR. JAMES A. CRUMLIN: Are we ready now on both sides?

MR. BENNETT CLARK: Yes sir.

MR. JAMES A. CRUMLIN: My name is James A. Crumlin and I am Acting Chairman of the Human Rights Commission and as such will be the presiding officer together with the other commission members. Each of us is supposed to have a plate placed somewhere within the vicinity of being in front of us so that this might help us in time identify ourselves. We have the case before us today of Mr. Paul Cummins who has filed a complaint in this matter. This complaint has been filed against the Parker Seal Company, Division of Parker-Hannifin Corporation of Berea, Kentucky. Where does Mr. Cummins live?

[4]

MR. THOMAS L. HOGAN: Mt. Vernon.

MR. JAMES A. CRUMLIN: Mt. Vernon. And there has been a call for an order of separation. I

think in order to make certain that everybody is satisfied and everybody is happy about this, we're going to ask all of the witnesses that are to testify for the complainant to stand. Now, Mr. Hogan, do you recognize all of these witnesses, these seven (7), as being yours?

MR. THOMAS L. HOGAN: Yes sir.

MR. JAMES A. CRUMLIN: There are none others?

MR. THOMAS L. HOGAN: Is Mr. Haddock here?

MR. BENNETT CLARK: No, we have called Mr. Haddock and Mr. Roy Kuhn who will be testifying in behalf of the Company. They are coming from their offices in Lexington and they're not here yet. They will be here by 2:30.

[5]

MR. JAMES A. CRUMLIN: Do you have other witnesses?

MR. THOMAS L. HOGAN: The only other, Mr. Ebendorf will be here and not testify but I talked to Mr. Clark about that and he agreed that he could remain with us.

MR. JAMES A. CRUMLIN: Is there a place convenient for all of the witnesses except for Mr.

Ebendorf and Paul Cummins that they might go and separate them from the hearing?

MR. BENNETT CLARK: We can sit them on chairs in the hall, but that's probably the best we can do.

MR. JAMES A. CRUMLIN: Now, you that are standing, except for the names of the persons we just mentioned, will you please retire to the hall? They tell us there are chairs out there — not — that's a good idea to take your chairs with you. Now, Mr. Cummins, will you pull up somewhere near there so we can see you and identify each other? Now, will the witnesses here [6] for Parker Seal Company please stand?

MR. BENNETT CLARK: Your Honor, the only witnesses that we propose to call are Mr. Dutch Haddock and Mr. Roy Kuhn. And they were the two (2) people that I mentioned that have been called and are coming from Lexington. And they will be here by 2:30.

MR. JAMES A. CRUMLIN: Then will you, sir, be responsible for making certain that no testimony is being given at the time that they might come in?

MR. BENNETT CLARK: Yes sir, I'll do that.

MR. JAMES A. CRUMLIN: Then are we otherwise ready?

MR. BENNETT CLARK: Ready.

MR. THOMAS L. HOGAN: Yes sir.

MR. JAMES A. CRUMLIN: We would like for the stenographer to express [7] there in the official record, and I believe that each of you have copies of the documents that I'm about to enumerate at this point. If not, please state so. We have the original complaint which was subscribed and sworn to on the 28th day of September, 1971 at Louisville, Kentucky. Do you have a copy of that?

MR. BENNETT CLARK: Yes sir, I do.

MR. JAMES A. CRUMLIN: It is a two (2) page document and we have it here, from the Clerk for you here. We also have notice of the hearing which is dated the 29th day of November, 1971. Mr. Clark, do you have a copy of that?

MR. BENNETT CLARK: Yes sir, we do.

MR. JAMES A. CRUMLIN: The next we have, the certified letter transmitting notice of hearing to the respondent. Do you have a copy of that, sir?

[8]

MR. BENNETT CLARK: Yes sir, we do.

MR. JAMES A. CRUMLIN: And you acknowledged having it?

MR. BENNETT CLARK: Yes sir.

MR. JAMES A. CRUMLIN: We have a certified letter transmitting notice of hearing to the complainant, do you have that?

MR. BENNETT CLARK: Yes sir.

MR. JAMES A. CRUMLIN: Lastly we have the answer of the respondent which is filed and it is certified that a copy was served on the Commission on the 6th day of December, 1971. If I may back up for a moment, I'd like to identify the date of the certified letter transmitting notice of hearing to the respondent, and show the date of that to be November the 29th, 1971 and on the same date the certified letter transmitting notice of hearing was issued to the complainant. Gentlemen, do we have any motions to be made at this time?

[9]

MR. BENNETT CLARK: Your Honor, the only motion that I might propose for motion, as such, and I think that essentially it's incorporated in our answer, is that the charge which has been lodged against the Company by the Human Rights Commission be dismissed for the reason that the complaint, I do not believe, states the cause of action under the laws that now stand in this Commonwealth. And I move that the complaint be dismissed. I simply want to make that for the record.

MR. JAMES A. CRUMLIN: Do you have any comment on that?

MR. THOMAS L. HOGAN: I think his answer and motion to dismiss goes to the merit of the case as well as basically denying the truth of the allegation of the complainant and the factual statements made. And the Commission advised holding in abeyance their decision on that until after a full hearing in the case.

MR. JAMES A. CRUMLIN: I believe it is the common consensus of the opinion [10] of the Commission members we will withhold any decision on your motion at this time.

MR. BENNETT CLARK: Thank you.

MR. JAMES A. CRUMLIN: Mr. Hogan, will you please state for us the position that you intend to prove for us, are we having any stipulated agreements?

MR. THOMAS L. HOGAN: Well, the thing I have, Mr. Crumlin, is a list which I would like to read into the record. I've shown it to Mr. Clark. The dates involved in the claim and setting up the jurisdiction. So we agreed to stipulate that the Commission does have jurisdiction in the case. These are the dates the statute required for certain things done.

MR. JAMES A. CRUMLIN: Any objection to that?

MR. BENNETT CLARK: No sir. If I may suggest, just give that to the Court Reporter and let her copy it in.

MR. JAMES A. CRUMLIN: Will each of you sign it?

[11]

MR. BENNETT CLARK: Alright, sir.

MR. THOMAS L. HOGAN: You won't be able to read my signature but I'll sign it.

MR. JAMES A. CRUMLIN: That's alright, just as long as we can identify it as being you.

(Both attorneys, Mr. Bennett Clark and Mr. Thomas L. Hogan sign the case chronology to be copied into the record.)

CASE CHRONOLOGY

9-3-71	Complainant discharged
9-28-71	Complaint was signed and sworn
10-1-71	Complaint filed with KCHR in its Frankfort office
10-5-71	Complaint served on R. by mail
10-5-71	Finding of probable cause made
10-5-71	Conciliation attempted
11-29-71	Conciliation attempted

11-29-71 Case set for hearing R. Complainant and A.G. served with Notice of Hearing.

[12]

MR. THOMAS L. HOGAN: If it please the Commission, I just have a few opening statements I'd like to make so we can get to the facts of this case. This is an unusual complaint situation before the Commission involving a religious discrimination complaint. Paul Cummins is a member of the World Wide Church of God and in that particular sect the Sabbath is observed from Friday sundown until Saturday sundown. Mr. Cummins' discharge came out of his refusal to work on Saturday. And it is our position that the fact of the company's policy of requiring Mr. Cummins to work on Saturday is discriminating against him because of his religion. I think we're all aware there is no intent provision in the statute. We're not contending that the company intended to discriminate against Mr. Cummins or anyone else of his religion by having this Saturday working policy. I think the purpose of the Civil Rights legislation is to protect the classes of the people, be they blacks or be they members of certain religious sects. And the policy, even though its applied uniformly, if the effects of that is to discriminate against a certain sect or [13] class of persons and that is, legally and under our law since

the 1964 Federal Civil Rights Act, discrimination. What the complainant contends is that there is a burden upon the company to accommodate the religious beliefs of their employees. They are somewhat guided by that under the Equal Employment Opportunity Religious Discrimination Guidelines.

MR. JAMES A. CRUMLIN: Mr. Hogan, may I interrupt you a minute? I think that what we want here and now is some factual statements and then we'll get to the legal point of it later.

MR. THOMAS L. HOGAN: Well, I think, if you please, Mr. Crumlin, the facts really are not in dispute.

MR. JAMES A. CRUMLIN: Do we have that in any stipulation?

MR. THOMAS L. HOGAN: Well, I'd say the fact is, they are somewhat. I'm sure Mr. Clark is going to dispute exactly that this was the only reason that Mr. Cummins was discharged. But I think it would give the [14] Commission a better overall view as the testimony were given if they had some idea exactly why some particular testimony is being given. Because basically what we will try to elicit for the facts is that Mr. Cummins was discharged because he would not work on Saturday and that the failure of the company to accommodate him is religious discrimination. And that there is not

an undue hardship on the company to accommodate Mr. Cummins because of his religious beliefs. And that basically is what we will be attempting to prove, that there is a burden on a company to accommodate a person's religious beliefs and this burden was not met by the company in this particular case.

MR. JAMES A. CRUMLIN: Do you have anything to say, Mr. Clark?

MR. BENNETT CLARK: If it please the Commission, Mr. Crumlin, I fear that I'm going to fall in the same fault that Mr. Hogan may have, but I think also that since the Commission in this case has basically a legal position both of the Commission and the company on this —

[15]

MR. JAMES A. CRUMLIN: If I understand, what both of you are saying is that you do not deny and it is generally admitted on both sides that Mr. Cummins was discharged because of his religion?

MR. BENNETT CLARK: No sir, that is not correct. Simply stated, our answer is that we did not discharge Mr. Cummins because of his religion.

MR. JAMES A. CRUMLIN: That's the question that he has here.

MR. BENNETT CLARK: We did not discriminate against Mr. Cummins because of his religion or for any other reason. We simply did not discriminate against Mr. Cummins. And, of course, this case is being brought under the Kentucky Civil Rights Act of 1966 — 68 and which, I believe that the Commission is aware, follows, at least in pertinent part to this situation, follows the Civil Rights Act of 1964, and Title Seven (7) specifically, which our Federal Government has adopted. It has been our understanding, through numerous conferences with Mr. Ebendorf and as Mr. Hogan has just stated, that the Commission [16] has accepted as the proper interpretation of the law of this Commonwealth that the duty not to discriminate on religious grounds required by Section 344.040 of the Kentucky Revised Statutes, which is the Kentucky Civil Rights Act, includes an obligation on the part of the employer to make a reasonable accommodation for the religious beliefs of employees and prospective employees where such accommodations can be made without undue hardship in the conduct of the employer's business. And, as I believe that Mr. Hogan again stated, I don't think he carried through with it, this interpretation follows the guidelines of the Equal Employment Opportunity Commission, the guideline which was promulgated on July 10, 1967 and carries Guideline Part Number 1605.1. And this is the same interpretation, that is,

this Equal Employment Opportunity Commission interpretation which I mentioned is the same interpretation which apparently has been followed by this Commission in the only two (2) previous religious discrimination cases which have been filed with the Commission. I believe that those cases are McCutchin and Grimm vs. Two Turns, [17] Division of Chemtron and Phelps vs. Trane Company, which is a case I believe emanating from Somerset, am I correct in that Mr. Ebendorf?

MR. THOMAS A. EBENDORF: That's correct.

MR. BENNETT CLARK: Simply stated, the Company's position, and I believe this is the fact of this case, is that Mr. Cummins' employment with Parker Seal was terminated because — we admit that we terminated Mr. Cummins' employment but it was for a cause other than religion, this cause was solely dominated by certain business considerations and the failure of Mr. Cummins to carry out certain plant regulations and to work scheduled work. Now, Mr. Cummins was an exempt employee, he was a foreman. As a matter of fact, he was one of the higher foremen at the Parker Seal Company. He was an exempt employee which meant that his work did not fall under the Wage and Hour Provisions or the Fair Labor Standards Act. That is, he did not punch a time clock, he didn't punch in and punch out. He was not a member of [18] the union. His work required that he be on call whenever he was required

to work in his Department, which was the Banbury Department, which is the keystone of this operation because that's where they have the recipies and that's where they mix the rubber that makes the product that Parker Seal sells. And without the Banbury the whole business collapses. Now, his responsibility was that when his people worked that he worked. And the only time that any employee at Parker Seal was called to work was when business demanded, they don't work people for reasons when business does not demand it. The only reason that this company ever worked on Saturday was because that their orders for goods demanded it. Because, as we will point out through certain union contracts, this company is required to pay time and a half pay for employees who work on Saturday. And I think obviously the company is not going to pay time and a half pay if they don't have to. And our case is simply that we discharged Mr. Cummins because he refused to perform the work that was scheduled for him which he'd performed for years and religion had nothing to do with this. That's all, Your Honor.

[19]

MR. THOMAS L. HOGAN: At this time instead of starting with Mr. Cummins I want to start with Mr. Kelly Barfield. And I've discussed it

with Mr. Clark. Mr. Barfield is the Minister at the World Wide Church of God.

MR. JAMES A. CRUMLIN: Mr. Clark, is that agreeable?

MR. BENNETT CLARK: Yes sir.

MR. JAMES A. CRUMLIN: Let the record show that it is agreed that Reverend Garfield may be called out of turn.

EVIDENCE FOR THE CLAIMANT

The witness, Reverend Kelly H. Barfield, affirms his testimony to be the truth, the whole truth and nothing but the truth.

INTERROGATION BY MR. THOMAS L. HOGAN.

Q-1. Please state your full name, Mr. Barfield?

A., Kelly H. Barfield.

Q-2. And your address, please?

A., 3475 Castleton Way North, Lexington.

[20]

Q-3. And what is your occupation?

A., Minister.

Q-4. Of the?

A., World Wide Church of God.

Q-5. And that's located in?

A., Lexington.

Q-6. And is Mr. Paul Cummins one of your parishioners?

A., Yes.

Q-7. How long has he been so?

A., Since September of 70 as a member.

Q-8. And could you just explain to the Commission exactly what the belief is of the World Wide Church of God in relation to the observance of the Sabbath?

A., Yes, it is the belief, as stated in Article Twelve (12) in the constitution and by-laws of the church, that for a person to remain in good standing with the church that it's necessary that he observe the Sabbath from sundown Friday until sundown Saturday.

Q-9. Now, when you say observe the Sabbath, exactly what does that mean?

A., That would mean refraining from the normal labor and work during the week and observe that as a day of rest.

Q-10. What is permitted, what type of labor or what type [21] of activity is permitted on the Sabbath?

A., No type labor as far as normal work that a man might do during the regular six (6) days of the week. That's a day of rest and a person then on that day will be with his family as well as church attendance.

Q-11. Is there any type of entertainment or any type of other, say, sports activities allowed on the Sabbath?

A., No, basically it would be church attendance on that day.

Q-12. And has Mr. Cummins been a regular attender at your church?

A., Yes.

Q-13. Since he joined?

A., Since he joined and even before, for approximately two (2) years he came with his wife and family.

Q-14. What is the effect of someone who is a member of the church but then, say, continues to work on the Sabbath?

A., That they no longer be in good standing with the church.

Q-15. You say that Mr. Cummins was attending church before he actually became a member?

A., Right.

[22]

Q-16. When did he actually start attending?

A., I don't know the exact date, I wasn't here at the time. I was transferred here from Arkansas in July of 1969. He was attending before that.

Q-17. Could you just, to give the Commission a better understanding of the church, give them some idea of what the other beliefs and the other tenets are of the church?

A., Well, we also believe in the observance of seven (7) annual holy days that come during the year that are basically the same as the Jewish holy days. And we believe in the observance of those and again for a member to maintain good standing with the church that it is necessary then that he observe those days during the year.

Q-18. And when you say observe, this would be observed the same as the Sabbath is observed?

A., The same as the Sabbath, that he would refrain from the normal work.

Q-19. I want to show the Commission a list of the Feast Days and ask Mr. Barfield if these are the days that he's referring to?

A., Right, it gives the date of the days all the way through 1977. These are the days that were referred [23] other than the weekly Sabbath.

MR. THOMAS L. HOGAN: Unless there's any objection I'd like to enter this as Exhibit I, please.

MR. BENNETT CLARK: No objection.

MR. JAMES A. CRUMLIN: Alright let it be entered as Complainant Exhibit I.

Q-20. I notice on the one listing Passover it has "observed the previous evening" does that mean that that actual date is not observed?

A., That the actual date is not a regular annual Sabbath.

Q-21. So that, in other words, a person could work then on that day?

A., On that day, yes, but the day following is one of the annual Sabbaths.

Q-22. What type of services do you have as far as when are they, the actual church services on a normal Sabbath?

A., They're held in Lexington in the afternoon. That's normal service where we have the opening prayer, we have usually a sermonette of approximately twelve (12) [24] minutes and then any announcements, and further songs and then a full sermon, basically an hour to an hour and a half, and then the closing prayer. So the services usually last two (2) hours.

Q-23. So I think we could say then that the Sabbath is spent in either prayer or meditation or related subjects?

A., Right.

MR. THOMAS L. HOGAN: I believe that's all the questions I have.

INTERROGATION BY MR. BENNETT CLARK.

Q-1. Reverend Barfield, how long have you been a Minister of the World Wide Church of God?

A., As an Ordained Minister since 1961.

Q-2. How many different congregations have you had?

A., As far as serving, eight (8) or nine (9) services. Nine (9) different churches or congregations.

Q-3. I believe that you have stated, just for the record, that you do know Mr. Paul Cummins who is the complaining party in this case?

A., Yes.

Q-4. And how long have you known him?

[25]

A., Since 69.

Q-5. Does Mr. Cummins have what you would consider a very steady record of attendance with your church since 1969?

A., Yes.

Q-6. And this has been on what days that he attended?

A., On all Sabbaths as well as the seven (7) annual Sabbaths.

Q-7. That is, all Sabbaths being from sunset on Friday until sunset on Saturday?

A., Right, he has attended services on that day.

Q-8. And in addition the periods which are set forth, as what I believe has been shown and marked Exhibit I, is that what you're saying, sir?

A., Right.

Q-9. And this has been for what years now that he's maintained a steady record?

A., Since 69, since I've known him.

Q-10. What is the size of the congregation where Mr. Cummins attends church?

A., Approximately four hundred (400).

Q-11. Four hundred (400). Aside from attending church during your Sabbath periods did Mr. Cummins take any sort of active part in other religious activities of your church?

[26]

A., Yes, he's a member of the speech club that I conduct which is for leadership training. He also participates in the social activities of basketball and teenage activities, young adult activities.

Q-12. When does the speech club meet?

A., It meets on Sunday night.

Q-13. In your opinion and based upon your position as a Minister of the World Wide Church of God, and specifically we're concerned now with Mr. Paul Cummins, do you believe that it's important to your Lexington congregation and for the denomination of your church as a whole that the Parker Seal Company accommodate Mr. Cummins and permit him to remain free from any work responsibilities on the Sabbath period or on any of the holy days? Do I make myself clear?

WITNESS: Do you mean in connection with the company?

MR. BENNETT CLARK: No, I'm asking about his religion, do you think that it's important to his religion?

MR. THOMAS L. HOGAN: I object, the importance would be to Mr. Cummins [27] personally not to the —

MR. BENNETT CLARK: Well, I think that this minister has qualified himself as an expert in the practice of the faith of the World Wide Church of God. I think that he can make comments based upon his observance of Mr. Cummins, of Mr. Cummins' activities in the church and whether or not he believes Mr. Cummins is an active and responsible member of his church.

MR. THOMAS L. HOGAN: If I understood the question, you're asking him —

MR. JAMES A. CRUMLIN: Objection overruled.

Q-14. Do you want me to repeat the question, would that help you?

A., Right.

Q-15. I'm asking you of your opinion and this is based upon your years as a minister of the World Wide Church of God and your observations of the members of the congregations of which you've been a minister and your observations of Mr. Paul Cummins, do you [28] believe that it is important, not only to Mr. Cummins, but also to your congregation of which he is a member and apparently an active part, that this company accommodate him and let him remain free from work responsibilities during the Sabbath period and during the holy days that your church celebrates which occur during the year?

A., I feel this, that a man should be given a right as a member to labor and work in a company, whether Parker Seal or any other company, as long as it doesn't detriment the company for him to remain in good standing with the church.

Q-16. I'm asking you about your congregation, not about the company?

A., And it's beneficial with the congregation with him to maintain a job, to actually be active in the furtherance of the work financially.

Q-17. Is it important to the congregation that he be present at church on Saturdays — pardon me, the Sabbath period and during the holy days?

A., Yes. It is important that all members be there.

Q-18. Do you think, again based upon your background as a minister of this church and your observations of Mr. Cummins, do you think that his continued presence, [29] and I'm looking now into the future, that his continued presence at your church's services on the Sabbath period and holy days will serve to strengthen your church and do you think that it will help to move forward what you perceive to be your church's mission in the world?

A., Certainly.

Q-19. I guess what I'm asking you is this, do you think that it's important that Mr. Cummins be accommodated and be permitted to continue with his work in your church?

A., Right, every member is important.

Q-20. I brought with me a calendar, which I will be glad to share with the Commission members, I ripped out from my old notebook in the office, but I want to go over with you just for the period of

1971 the actual days of the week on which the holy days listed on the chart recorded as Exhibit I have fallen. The first date — would you like a copy of this, would it help you if you had a copy of this?

A., No, I think I remember the dates on ours.

Q-21. This is 1971 and I'm asking you specifically concerning the Annual Feast Days of God. I believe the first one was March the 27th and that would have fallen on [30] a Saturday? I'll be glad to present my calendar to you so that you might —

A., Well, I have one here.

Q-22. Well, I'm taking the days of the week off of my calendar here. The second one is the Passover period of April the 9th, I believe that would have fallen on Friday, the second Friday in April of 1971? Do you remember if these were the days on which you —

A., I don't remember the exact days, no.

Q-22. Alright, well let me just read them into the record then. April 10th, and I understand this is through the 16th, that is, that entire period is considered a holy day period?

A., No, just the first and last day.

Q-23. Oh, alright, excuse me. Alright, then April 10th would be the second Saturday in April of 1971 and April the 16th would be the third Friday in April of 1971?

A., Right.

Q-24. The next one is Pentecost, which is May the 31st which is the last Monday in May of 1971. The next is the Feast of Trumpets, which is September 20th, which is the third Monday in September of 1971. The next is the Day of Atonement, which is Wednesday, [31] September the 29th?

A., Right.

Q-25. The last Wednesday in September of 1971. The Feast of Tabernacles, October 4-10. October 4 is a Monday, the first Monday in October of 1971. And October the 10th is the second Sunday of 1971. The Last Great Day is October the 11th, and that is the second Monday in October of 1971?

A., Right.

Q-26. Now, it's your opinion as Minister of this church that Mr. Cummins' employer should accommodate his religion and permit him to be absent from work and relieved of all work responsibilities on each of the holy days which I have just named?

A., Well, we feel this, certainly as a part of our belief that it's important for an individual to maintain good standing with the church as well as with God that he observe these days.

MR. BENNETT CLARK: That's all the questions I have.

INTERROGATION BY MR. THOMAS L. HOGAN.

Q-1. When did you become aware of Mr. Cummins' problems with the Parker Seal Company?

[32]

MR. BENNETT CLARK: I object to that. I don't know that there's been any testimony to any problems yet.

MR. JAMES A. CRUMLIN: I'm sorry, I wasn't listening too closely, what was your question?

MR. THOMAS L. HOGAN: I asked him when he became aware that Mr. Cummins was having problems with the Parker Seal Company. I'm referring to the date he was discharged.

MR. JAMES A. CRUMLIN: I think you ought to specify the problem.

Q-2. When did you become aware that Mr. Cummins was discharged?

A., It was sometime in September of 71, if I remember right. I can't remember the exact date.

Q-3. When Mr. Cummins talked to you had he been discharged at that time?

A., The first time I was aware of it was at the time that he was told that he had —

MR. BENNETT CLARK: I'm going to object, for it to get to hearsay.

[33]

MR. JAMES A. CRUMLIN: Sir, I don't think you can tell what he told. I think in answer to his question, if you know and if you can remember or have anyway of refreshing your memory and if you can tell him or this Commission when it came to your attention that he had been discharged, you may do that.

A., It was sometime, September or October of 71.

MR. THOMAS L. HOGAN: I think it would be permissible for him to tell us what Mr. Cummins told him.

MR. JAMES A. CRUMLIN: I think he can go that far but when he was saying somebody told Mr. Cummins, I don't think he ought to go that far.

Q-4. Well, that's — what did Mr. Cummins tell you?

A., He told me that he had basically one (1) week in which to decide whether or not he would work on the Sabbath or would be relieved of his duties if he would not work on the Sabbath.

Q-5. And was it after that time that Mr. Cummins told you that he had been discharged?

[34]

A., Right.

Q-6. And for the reason of not working on the Sabbath?

A., Yes.

MR. BENNETT CLARK: I object to that.

MR. JAMES A. CRUMLIN: You are putting words into his mouth.

Q-7. For what reason did Mr. Cummins tell you he was discharged?

A., Because he wouldn't work on the Sabbath.

MR. THOMAS L. HOGAN: I think that's all.

INTERROGATION BY MR. BENNETT CLARK.

Q-1. Reverend Barfield, one (1) question. Did he tell you the reason that he was terminated was because he wouldn't work on the Sabbath or wouldn't work on Saturday?

A., Well, sometimes we refer to it as Saturday and sometimes we refer to it as the Sabbath.

Q-2. I don't want to be a nit picker but it's a fact that the Sabbath ends at sundown Saturday?

A., Right.

[35]

Q-3. So a portion of Saturday is not included in the Sabbath then?

A. That's true.

MR. BENNETT CLARK: No further questions.

MR. FRED ANHOUSE: Does Parker Seal work on Sundays?

MR. BENNETT CLARK: Mr. Anhouse, I'll answer that. Occasionally, I think.

MR. JAMES A. CRUMLIN: Well, I don't think he's qualified.

MR. BENNETT CLARK: We will have a witness.

MR. FRED ANHOUSE: Well, can I ask Reverend Barfield something else then?

INTERROGATION BY MR. FRED ANHOUSE.

Q-1. What is your policy on travel on Saturdays at the church, is there any observance of that, based on the Jewish faith on this point?

[36]

A., Well, based on the Jewish faith, the Old Testament, that a man is permitted to travel within his church area to attend Sabbath services.

Q-2. This is o.k. with your church belief then?

A., Certainly.

Q-3. What kind of attendance does your church have on Saturday, in numbers, how many people come?

A., Approximately three, fifty (350) or above.

Q-4. What about other activities, let's say, after your services, is it o.k. with the church if you go shopping or do something else?

A., No.

Q-5. What are you supposed to do after services?

A., Return home and to rest until the Sabbath is over.

MR. JAMES A. CRUMLIN: Any other questions? That's all, sir.

* * * * *

The witness, Mr. Paul Edwin Cummins, affirms his testimony to be the truth, the whole truth and nothing but the truth.

[37]

INTERROGATION BY MR. THOMAS L. HOGAN.

Q-1. Would you please state your full name and address for the Commission?

A., Paul Edwin Cummins, Box 85, Mt. Vernon, Kentucky.

Q-2. And what is your religion, sir?

A., I belong to the World Wide Church of God.

Q-3. And are you now currently employed?

A., Yes sir.

Q-4. As what?

A., Carpenter.

Q-5. And how long have you been employed in that position?

A., Since around November the 29th, I believe.

Q-6. And were you employed at the Parker Seal Company?

A., Yes sir.

Q-7. When did you first go to work for Parker Seal?

A., December the 9th, 1958.

Q-8. And what position did you hold at that time?

A., Production Scheduler.

Q-9. And what did that involve?

A., Keeping records of production of the molding of the press line, also recording the

pre-forms made by the Stock Preparation Department.

Q-10. Now, which department did you work in at that time?

[38]

A., Well, we were working in the Molding Department. We were charged to that Department for accounting purposes.

Q-11. How long did you stay in that particular position?

A., Approximately two (2), maybe three (3) years.

Q-12. And then where did you go?

A., I went into scheduling in the Stock Preparation Department.

Q-13. Now, was that a promotion or just a transfer?

A., Well, it was, in one sense, a transfer into a different department, also an opportunity to learn a different job.

Q-14. Were you paid more money?

A., Eventually I was paid more money. I don't recall if there was an increase in salary at the time I moved.

Q-15. At this time were you paid as an hourly employee or were you a Company employee?

A., I was salaried.

Q-16. And you were not a member of any union?

A., No sir.

Q-17. Were you a Supervisor in any manner?

A., No sir, not at that time.

Q-18. What position did you hold next?

A., I went to a Supervisor in the Stock Preparation Department.

[39]

Q-19. How long did you hold that position?

A., Approximately six (6), seven (7) months, from there I went to the Supervisor of the Banbury Department in approximately May of 1965.

Q-20. And how long were you in that position, Supervisor of Banbury?

A., From May, 1965, or thereabouts, until September the 3rd, 1971.

Q-21. What happened on September the 3rd, 1971?

A., I was terminated from Parker Seal for failure to work on Saturday, which is my Sabbath.

Q-22. Would you explain to the Commission exactly what, I think you said you were the Supervisor of the Banbury Department, exactly what the Banbury Department does in its relationship to the Parker Seal Company?

(The answer is stricken from the record)

MR. BENNETT CLARK: Pardon me, at this point, Your Honor, I've just been informed by one of the Company officials that inadvertently, perhaps, Mr. Cummins' statement as to the various ingredients used in this product may involve trade secrets on this type of product, and we would request that [40] it be stricken from the record. I don't think it has anything to do with this case.

MR. THOMAS L. HOGAN: I have no objection.

MR. JAMES A. CRUMLIN: Let it be stricken.

Q-23. Now, in the operation of the Banbury Department, how many men were working under you?

A., Well, usually anywhere from eight (8), nine (9), ten (10) men on the first shift.

Q-24. And you said you were the Supervisor of the first shift?

A., Yes sir.

Q-25. Were there any other shifts in Banbury?

A., Yes sir, there was a second shift and on occasion we had also a third shift.

Q-26. And who were the Supervisors of those shifts?

A., As such, there was no Supervisor in the Department on the second or third shift. This was covered by a Supervisor in adjoining department.

Q-27. And what department was that?

A., Stock Preparation Department.

Q-28. What exactly did your job entail as far as what you actually did? How did you spend the day?

[41]

A., By securing orders from the various clients that needed the synthetic rubber compound. After obtaining those orders I proceeded to schedule a production out for our facilities to make this needed material to move out to the other plants and departments. Also reviewing, checking inventories to maintain a working level but not having too much money tied up in inventory, and preparing the schedules for the second shift.

Q-29. So you would prepare the schedules then for —

A., The second and third shift, when needed.

Q-30. All the Banbury shifts?

A., Yes sir.

Q-31. How many there were on that particular day?

A., If there happened to be two (2), there was two (2) schedules, and three (3), there was three (3) schedules.

Q-32. Well, did you actually as far as — how much of your time, let's say, in a normal work day was spent in inventorying and scheduling?

WITNESS:

Do you mean hours or —

[42]

MR. THOMAS L. HOGAN: The hours of the day, an eight (8) hour day.

A., Well, that took a considerable amount of time to group the orders together and get that schedule out. This is done during the morning portion of the day to review everything and see that we had what we needed. And actually it would depend on how many orders we had to the extent of what amount of time was spent. We had high periods and low periods.

Q-33. What would be the average percent of time you spent on these two functions?

MR. CRUMLIN: There's no question as to the hours spent on these, is there?

MR. HOGAN: No, there isn't. The point of this particular line of questioning is, and I think will come out later, is whether or [43] not the Banbury operation functioned as well whether or not Mr. Cummins was there.

MR. CRUMLIN: I don't know about the rest of the Commission but it is my impression that it was not necessary to have a supervisor on each shift.

MR. HOGAN: That's my point. There was only one supervisor hired on the first shift. There was no supervisor on the second or third shift.

MR. CRUMLIN: We are going to run into another session it looks like if we don't get on. Let's try to move on with it.

[44]

MR. HOGAN: Bear with me. It is a very important part of our case as to exactly what he does when he is on the job and whether or not it was necessary for him to be physically present.

MR. CRUMLIN: Are you saying that it is not necessary for him to be present, physically present?

MR. HOGAN: What Mr. Cummins has said is that his job involved inventorying and scheduling.

There may be some confusion as far as there having to be a supervisor. He stated earlier that on the second or third shifts there was no other supervisor for Banbury; that whoever was supervisor in Stock Preparation had the supervisory capacity over the Banbury Department.

MR. CRUMLIN: Alright, let's see.

Q-34. You said you had eight or ten men under you on the first shift?

A., Yes, sir.

[45]

Q-35. How much time did you spend actually supervising these eight (8) or ten (10) men?

A., Actually watching in the operation, for a very small amount of time observing, because of graphs and charts which we had which I reviewed daily, I was able to determine whether or not these men were working. I was available in my office in the center of the operation but I wasn't always looking at the men directly more than two (2) hours a day at the most.

Q-36. These men that were working were following the schedules you set up?

A., Yes.

Q-37. Now on the second shift was it necessary to have a supervisor in the Banbury operation?

A., No sir, because —

MR. BENNETT CLARK: I object to his opinion as to whether or not it was necessary.

Q-38. Was there ever a second shift Supervisor in the Banbury Department during the time that you were with Parker Seal?

A., Yes sir, at one brief period of time there was. The production was fairly low, the men weren't doing a [46] very good job and there was a second shift Supervisor for a short period of time and after, well, some comments he made to the men he's been moved back.

Q-39. So the usual procedure there is not to have a supervisor?

A., That was standard procedure over the years that I was with Parker Seal Company.

Q-40. When did you join the World Wide Church of God?

A., As far as fully becoming a member, it was September of 1970.

Q-41. Had you been active at the church before that time?

A., Yes, as far as attending the activities, observing the holy days, the annual Sabbaths, feasts and those things, I did attend those.

Q-42. Did you attend services on each Saturday?

A., Yes sir, since about April or May, 1969.

Q-43. And what did you do about your job?

A., Well, I was granted permission to leave the plant. I would go in and work a partial day on Saturday, I was granted permission then to leave and take my family to the Sabbath services.

Q-44. And who granted you this permission?

A., My superiors, the General Foreman, Mr. Charles Clark, the Plant Manager, Mr. Conley Saylor.

[47]

Q-45. And you told them why you were leaving work?

A., Yes sir.

Q-46. Now, at this time you were working in the Banbury Department?

A., Yes sir.

Q-47. So I would assume then that you were working on Saturday if the Banbury Department was operating?

A., Not necessarily. I was also, at that particular period of time, working in Stock Preparation and the Banbury at the same time, in 69. And there was occasions when the Banbury wouldn't work when the other departments would.

Q-48. When you started the practice of leaving

work, of coming in and then leaving, was someone else called in to replace you?

A., No sir.

Q-49. Who did the supervising of the Banbury Department, of do you know?

A., The Foreman in the Stock Preparation Department would take care of the Banbury.

Q-50. Was there any problems with the other employees with you not working a full day?

MR. BENNETT CLARK: Object unless he says, if you know. He may not have known, they may have been complaining [48] to somebody else.

A., As far as I know there wasn't. We had a good working relation between the men in the Stock Preparation and Banbury, if one of them needed to be off I was available to fill in at any other time other than my Sabbath or an annual holy day, and they knew this.

Q-51. Did you tell them that you were available?

A., Yes sir.

Q-52. Did anyone ask you to fill in for them?

A., Yes sir, on occasion I was asked to fill in, which I did. On occasion I was scheduled to work twelve (12) hour shifts, which I did. Anytime the plant ran on Sunday I was there.

Q-53. When you went to, I think you said, Mr. Clark and Mr. Saylor to tell them you were only going to work partially on Saturdays did you say anything to them about making up these hours that you'd be losing?

A., Well, with the number of hours I was working there was no question about it at that time. They said as long as you get the job done, why, they didn't really care.

MR. BENNETT CLARK: I object to, they.

[49]

Q-54. Who were you referring to?

A., Mr. Conley Saylor and Mr. Charles Clark.

Q-55. When did you start attending — when did you become a full member of the Church of God?

A., I began observing the Sabbath on July of 1970.

Q-56. Did you have any conversation with Mr. Saylor or Mr. Clark at this time?

A., Yes sir, I had a meeting with Mr. Saylor about it. I told him that I wouldn't be available for Saturday work after that given period of time.

Q-57. And what did Mr. Saylor say?

A., He said he would think about it and let me know in a few days whether I still had a job or not.

Q-58. What did you tell him? Did you say — did you ask him to give you off or did you tell him that you could not work?

A., I told him, due to the religious belief that I had that I'd proven that Saturday was the Sabbath Day, and that it would be wrong for me to work on the Sabbath, and that I wouldn't be available for work. I would work any other time except on the Sabbath or an annual holy day, he could name the hours or the time, what he wanted me to do and I would be glad to take care of that.

Q-59. What did you tell him you would do if he wouldn't [50] let you off on Saturday.

A., I didn't tell him I would do anything. I mean, I just wouldn't be available for work and if he wanted to fire me at that time it was — well, he could have fired me.

Q-60. And what — he said he would let you know within a few days?

A., Yes sir.

Q-61. And what did he let you know later?

MR. BENNETT CLARK: I object, that's hearsay.

MR. THOMAS L. HOGAN: I think he can testify as to what Mr. Saylor told him.

MR. BENNETT CLARK: Well, that was somebody else talking, it's hearsay.

MR. THOMAS L. HOGAN: Well, I think the conversation he's just been relating has been the conversation he had with Mr. Saylor. I mean, there's no problem Mr. Saylor —

MR. JAMES A. CRUMLIN: Is Mr. Saylor here?

[51]

MR. THOMAS L. HOGAN: Mr. Saylor is going to be a witness.

MR. JAMES A. CRUMLIN: Why not limit it, why not just ask him if he was advised by his employer that he would be affected and if so, which way.

Q-62. The time we're talking about was in July of 1970?

A., Yes sir.

Q-63. Were you fired at that time?

A., No sir, Mr. Saylor told me that I still had a job and that I could observe the Sabbath.

MR. BENNETT CLARK: Your Honor, that's just what I objected to.

Q-64. Did you continue to take off on Saturdays?

A., Yes sir, from that day forward I didn't work any Saturdays.

Q-65. Did you work the holy days?

A., No sir.

Q-66. Where there any other times when you were called upon to fill in for other employees after July of 70?

A., Yes sir.

Q-67. Were you ever assigned to work longer than an [52] eight (8) hour shift?

A., Yes sir, I was scheduled as a vacation fill in during the vacation period for the Spring and Summer of 1971.

Q-68. And what was your schedule?

A., Well, as a substitute Supervisor for the Stock Preparation Department. There was a slightly a manpower shortage of supervision. Many of the supervisors were scheduled for twelve (12) hour shifts. And I was scheduled in to fill in for some of these and also I volunteered to fill in for anyone that needed relief.

Q-69. You say you volunteered, how did you volunteer?

A., By telling my General Foreman Mr. Ken Hunt and the three (3) supervisors in the Stock Preparation Department that I would be glad to work for them anytime that they needed relief.

Q-70. Who were those three (3) supervisors?

A., Mr. Oscar Fain, Mr. Charlie Owens and Mr. Chester Webb.

Q-71. When you worked these — longer than your eight (8) hour shift, was that an assignment? Was that the posted assignment at the beginning of the week?

A., Normally they would put out a vacation schedule, I think, more than a week in advance to give you [53] the opportunity to prepare for the longer shift. Unless there was an emergency that came up, you knew about it in advance.

Q-72. When you say you told Fain and Webb and Owens you were available to fill in, were you told to do this, were you told to make yourself available?

A., Yes sir, Mr. Haddock told me that I should fill in and also I felt like I should fill in because of not working on the Sabbath.

Q-73. Were these other men working on Saturday?

A., They were working, yes.

Q-74. You originally said Mr. Saylor was the Manager, now you have mentioned Mr. Haddock. When did Mr. Haddock become the Plant Manager, or do you know?

A., Sometime near September or October of 1970.

Q-75. Did you tell Mr. Haddock you would not be working on your Sabbath?

A., The second Sabbath I missed, yes sir, I did. The first Sabbath I told him I wouldn't be available for that Sabbath. On a Monday morning following the Saturday passed he came to me and he said, I understand you're a Seventh-Day Adventist. And I said, no sir, I'm not, I belong to the World Wide [54] Church of God and I observe Saturday as the Sabbath. And he says, o.k., that'll be fine as long as it don't cause any problems I have no objections to you observing the Sabbath.

Q-76. And, if you know, when Banbury was scheduled to work on your Sabbaths who was taking your place?

A., Normally it was Mr. Chester Webb, which he volunteered to work in my place.

Q-77. Now, when Banbury works does Stock Preparation, does that work at the same time?

A., Normally it does, yes sir. There may be on occasion — well, seldom would you have Banbury going without Stock Preparation.

Q-78. Would Mr. Webb just be supervising the Banbury operation on Saturdays?

A., Seldom ever, he did on occasion, maybe once or twice a year.

Q-79. Would they have two (2) supervisors on Saturday, if you know?

A., The second shift Stock Prep. Supervisor would also be in to supervise the second shift.

Q-80. Well, would they have two (2) supervisors on the same shift?

A., No sir.

[55]

MR. BENNETT CLARK: I object to this. This man has testified that he did not work on Saturdays. He has no basis for this knowledge that he supposedly has. He's testifying about all these things going on on Saturday and he wasn't there.

MR. JAMES A. CRUMLIN: I think the objection is well taken unless you can ask him if he knows.

MR. THOMAS L. HOGAN: Well, I think, with the exception of the last question, I did.

Q-81. Do you know who was working on Saturdays?

A., Yes sir. After working with people for thirteen (13) years you get fairly close to them and you know — they tell you what they do and you tell them what you do.

MR. BENNETT CLARK: Your Honor, note my objection again. For the reason that working with people thirteen (13) years and you know all that they do and they know all that you do, if they told him it's [56] obviously hearsay. Otherwise it's — I don't know what it is.

MR. JAMES A. CRUMLIN: The record will also show this, the objection is overruled.

Q-82. I assume that since you were discharged from the Parker Seal Company that you must have had some problems with them, when did these problems first arise?

WITNESS: Would you repeat, please?

MR. THOMAS L. HOGAN: When did your problems first arise with Parker Seal which led to your termination?

A., Sometime during the last week of August, Mr. Dutch Haddock who was the Plant Manager of the Berea plant came to me, he stated very briefly, he says, I have a problem for you. I thought perhaps it was something to do with an emergency production order or something out of the ordinary. I said, well, let's shoot, let's have it, I'd like to get on it right away. He says, I've had a complaint from the Supervisor about you [57] not working on Saturdays. I said, is that right. And he said, yes sir. He says, you're going to have to start working on Saturday, I'm going to give you a week to make up your mind whether you're going to work or not. I said, that'll be fine. And approximately one (1) week later, about September 1, 1971, Mr. Dutch Haddock came into the office in Banbury and sat down and says, have you reached a decision. I said, yes sir, I notified the Company sometime ago that I wouldn't be available

on Saturday for work because of my Sabbath. And so he said, why do you have to go on Saturday. And I said, well, that's the Sabbath, and briefly explained to him that that was the Sabbath that we observed. He said, well, I'm sorry to hear that, he says, I may have to do something I don't want to do. I said, well, do whatever you have to if that's what you have to do. That was on a Wednesday. On a Friday morning, at approximately 8:30, September the 3rd, 1971, Dutch Haddock came to the office in Banbury and he sat down and he stated, we've had a parting of the minds. I said, is that right. He said, yes sir. He said, I hate to do this but I need a man to work six (6) days a week. And he proceeded to tell me he thought I had [58] handled the job well but that he needed someone to be there six (6) days a week. And that he had discussed with his superiors the possibility of a transfer into a different job. This was no because there were supposed to be no downgrades, and if you couldn't do the job you couldn't be downgraded. And he says, I hate to have to do it but I'm going to have to terminate you. And he said, I think you do a fine job for us but as he stated he needed a person for six (6) days a week. He says, I have your severance pay, your vacation pay, I have a Change of Status here, it's not on record yet, nobody will know that you've been fired until after you're gone. He says, we'll put out a memo after you leave stating that you're no longer with the Company but I'd like for you to work

the remainder of the day. I said, if it'll make you happy I'll stay all day. And that was around 8:30 in the morning. About 11:00, 12:00 o'clock my replacement came in. He says Dutch sent me over to see you. He says, what's up. And I said, didn't he tell you. And he said, no, he just told me —

MR. BENNETT CLARK: Your Honor — pardon me, Mr. Cummins but —

[59]

MR. JAMES A. CRUMLIN: I think he is going a bit far.

Q-83. You mentioned earlier that Mr. Haddock gave you a Change of Status Notice, I want to show you a copy and ask you if that is a copy of the Change of Status Notice that he gave you?

A., Yes sir.

MR. THOMAS L. HOGAN: If there's no objections this is Complainant's Exhibit II.

MR. JAMES A. CRUMLIN: Any objections?

MR. BENNETT CLARK: No sir.

MR. JAMES A. CRUMLIN: Let it be entered as Complainant's Exhibit II.

Q-84. Did at anytime when Mr. Haddock was talking to you did he make any reference to your not

being available for work at any other time besides your Sabbath?

A., No sir.

Q-85. Did he make any criticism of the efficiency of your Department?

[60]

A., No sir, I don't think he could question the efficiency in the Department.

Q-86. Did he say anything about the efficiency of your Department on Saturday when you weren't there?

A., No sir.

Q-87. Did he say anything about you working longer than eight (8) shifts?

A., At one point he mentioned that I should fill in for some of the other supervisors, which I volunteered to do and also when I was scheduled I did fill in for them. No, he didn't schedule me as far as any extra hours in the Banbury.

Q-88. Were you ever assigned any extra hours that you did not work, with the exception of your Sabbath or a holy day?

A., No sir.

Q-89. Was there any mention made of your not being present in the Banbury Department when it was working, with the exception of the Sabbath?

A., No sir.

MR. THOMAS L. HOGAN: I have no further questions.

[61]

INTERROGATION BY MR. BENNETT CLARK.

Q-1. Mr. Cummins, where do you live now?

A., Mt. Vernon, Kentucky.

Q-2. How long have you lived in Mt. Vernon, Kentucky?

A., Approximately thirty-eight (38) years.

Q-3. Where do you attend church, sir?

A., Lexington, Kentucky.

Q-4. Do you attend any meetings other than the church services offered in that church?

A., We have a semi-monthly bible study.

Q-5. What day of the week does that usually take place on?

A., It takes place at night.

Q-6. And you drive to Lexington for that?

A., Yes sir.

Q-7. Let me get this straight in my mind. How long had you worked for the Parker Seal Company prior to the time of your termination?

A., Approximately twelve (12) years and eight (8) months.

Q-8. When you first began to work for Parker Seal Company did you normally work on Saturdays?

A., Yes sir, I did.

Q-9. And at no time, up until the time you joined the World Wide Church of God, did you ever complain to the Company about working on Saturdays?

[62]

A., No sir, I did not.

Q-10. Did the Company frequently or often in the course of the period before you joined the World Wide Church of God schedule Saturday work?

A., It would all depend on the business, I guess, how the inventories was, sometimes they did, sometimes they didn't.

Q-11. But you were used to doing Saturday work?

A., Well, before I found out about the Sabbath I would work seven (7) days a week, Saturday wasn't

Q-12. Yes, I understand, I'm talking of before you found out about the Sabbath did you normally work on Saturdays?

A., If it was scheduled I did, yes sir.

Q-13. It was only after you joined the World Wide Church of God that you began to restrict the days and the hours of the days that you would work?

A., Well, I was restricted to not working on the Sabbath or the annual holy days, and I tried to schedule my vacation to cover a portion of those holy days.

Q-14. But it wasn't until you joined this church that you refused to work on the scheduled work days?

[63]

A., Yes sir, that's true.

Q-15. And so, what, for the ten (10), ten and a half (10-1/2) years you customarily and always worked on scheduled work days whether they fell on Saturdays or Wednesdays or whatever the day might be?

A., Yes sir.

Q-16. I believe you were, what is known as, an exempt employee?

A., Yes sir.

Q-17. Would you just explain for the ladies and gentlemen of the Commission what an exempt employee at the Parker Seal plant in Berea was? What did that mean?

A., Well, you're a salaried personnel person and was not restricted to punching the time clock.

Q-18. Did you generally work on call, that is, you weren't restricted to eight (8) hours a day or ten (10) hours a day?

A., No sir, I was available whenever I was needed, other than the Sabbath or annual holy days, I would receive calls at night many times to go in and get up out of the bed and go in to take care of a problem if it was something that was needed.

Q-19. And you paid a salary, weren't you?

[64]

A., Yes sir.

Q-20. And it's a fact that you were paid considerably more than an hourly paid employee, isn't it?

MR. THOMAS L. HOGAN: Objection, he wasn't an hourly employee at the time.

Q-21. Do you know what hourly paid employees are paid?

A., Yes sir, I did.

MR. JAMES A. CRUMLIN: Let him answer then, he's been up through the ranks and I think he should know.

Q-22. Was your salary significantly greater than the average salary of the hourly paid employees at the Parker Seal Company?

A., It would depend on what job they held. Are you talking about a sweeper or a technician, I mean, you know —

Q-23. I'm talking about the average employee at the Parker Seal Company, let's take a Stock Prep. top rated employee?

MR. THOMAS L. HOGAN: I object to significantly greater. I think — I'm sure that you have — he gave you what — [65] I mean, it would be ridiculous what you could make by this, to use the term of nit picking, is greater —

MR. BENNETT CLARK: Alright, Your Honor, I'll drop it.

MR. JAMES A. CRUMLIN: They weren't opposed, saying that you were nit picking and you could have been.

MR. BENNETT CLARK: Alright, I'll drop it. Thank you, Your Honor.

Q-24. You were not covered by the union contract were you?

A., No sir.

Q-25. You were considered, so far as the union contract was concerned, as part of management?

A., Yes sir.

Q-26. Were you also a member of the center program known as the Cost Goal?

A., Yes sir.

Q-27. What did the Cost Goal program require of you?

A., Well, it required that we exert every effort to show a greater return on the investment. The parent corporation granted us a certain amount [66] to work with and we were to go all out above, you know, to try to make the most profit with the least cost for the Company. And we shared in the profits that they made.

Q-28. So this was to your benefit?

A., Yes sir.

Q-29. You'd use your initiative and incentive and ingenuity?

A., Yes sir.

Q-30. I believe that you stated that at one time there was another Foreman who was Foreman of the second shift Banbury?

A., Yes sir.

Q-31. Was that Mr. Dan Dunn?

A., Mr. Dan Dunn was a Management Trainee, so I was told. He came through the Berea plant and working in various departments. No, he wasn't the man I was referring to.

Q-32. Do you know Mr. Dan Dunn?

A., Yes sir.

Q-33. Do you remember when Mr. Dan Dunn acted as Foreman of the second shift Banbury?

A., Yes sir.

Q-34. Do you know, of your own knowledge, what the efficiency rate of the second shift Banbury was at the time [67] that Mr. Dunn came?

A., Yes sir, well, I don't know the figures, I know it was low because we'd had a period for years of second shift Banbury being lower than the first shift. But I don't know the figures exactly for that period of time.

Q-35. And as a result of Mr. Dunn's work, if you know, did the efficiency of the second shift Banbury increase?

A., Yes sir, I say that there was an increase in the second shift Banbury production because two (2) employees who were very bitter against the Company and were afraid they were going to be fired by Dan Dunn, they were scared to death of him.

Q-36. Were they fired?

A., No sir, they told me this later after he left. They thought he was sent there to fire them.

Q-37. They weren't fired, were they?

A., No sir, they thought they were going to be.

Q-38. After Mr. Dunn left were there any other Foremen designated as Foreman of the Banbury

Department, as such? That is, prior to the time of your leaving the Company?

A., Not that I recall, sir.

Q-39. Was the work in the Banbury Department dangerous at [68] all, was there any danger involved in the work?

A., I think in a factory such as an o-ring factory there's always a possibility of a dangerous accident.

Q-40. Where is the Banbury Department physically located in the plant in reference to the Stock Prep. Department?

A., The building is facing East —

Q-41. Well, rather than getting into geographical location, is it upstairs or downstairs or —

A., O.k., they're located side by side, there's a sliding door between the two (2) departments. The Banbury Department is a three (3) story building, just adjacent to it is the Stock Preparation Department with a large sliding door about ten (10) by twelve (12) feet high.

Q-42. Where is the Foreman's office of the Banbury located with reference to the Stock Prep? Isn't it upstairs?

A., Yes sir, it is.

Q-43. So you've got to go through this wall — pull this sliding door, go through the wall, shut the

door, go up the stairs to get to the Foreman's department when you're going from Stock Prep. to Banbury?

A., It depends on what level you're going to, you may —

[69]

Q-44. Well, I'm saying when you go to the Foreman's office in Banbury?

A., Yes sir.

Q-45. Do identical employees work in the Stock Prep. Department who work in the Banbury Department?

WITNESS: What do you mean, identical?

MR. BENNETT CLARK: Well, does the same fellow work in the Stock Prep. Department part of the time during the shift and then part time in Banbury, or do you have different employees in the two (2) departments?

A., It could work that way, but normally they are scheduled to work in either one department or the other, but we had versatile employees who were capable of doing either job.

Q-46. On their shift don't they work just in one (1) department?

A., Unless there's an emergency or some deviation from —

Q-47. I'm talking about normal workers?

A., Yes, normal workers do.

[70]

Q-48. How many years did you work as the Foreman of the Banbury Department prior to joining the World Wide Church of God?

A., Somewhere in the neighborhood of three (3) years.

Q-49. During that three (3) years that you worked in the Banbury as the Foreman again did you work whenever Saturdays were scheduled?

A., Yes sir.

Q-50. As a result of your position as the Foreman of the Banbury Department did you ever learn why work was scheduled on Saturdays?

WITNESS: Did I ever learn why it was scheduled?

MR. BENNETT CLARK: Yes sir, what would cause the Company to schedule Saturday work?

A., Well, I felt like that it was — in my own opinion it was not —

Q-51. Well, I'm asking if you know what the Company reason for scheduling work on Saturday was, not your opinion but the Company reason?

A., No sir, I don't know what their reason was.

[71]

Q-52. Are you familiar with the Union contracts at the plant for 1968 and 1970?

A., Yes sir.

MR. BENNETT CLARK: Your Honor, at this time I'd like to show Mr. Cummins the two (2) contracts. Now, these are the only copies I have on me and, as you see, one of these is an antique. I will get copies if you want me to and send them to you. For the record I would like to indicate that I have asked the Court Reporter to mark as Company Exhibit I, what purports to be an agreement between the Parker Seal Company and the International Brotherhood of Firemen and Oilers, Local Number Seventy (70), dated October 8, 1968. It is bound in a tan cover. I'd also like to note that I have asked the Court Reporter to mark as company Exhibit Number II a booklet similarly titled except that it bears the date of July 15, 1970.

Q-53. Mr. Cummins, let me show you what has been marked as Company Exhibit I. Have you seen such an agreement before?

A., Yes sir, I've seen it.

[72]

Q-54. Are you familiar with that as the

contract between the hourly paid employees Union and the Parker Seal Company at Berea?

A., I was at one time, yes sir.

Q-55. Alright, sir. And I show you Company Exhibit Number II and can you identify that as the contract between the Company and the Union representing the hourly paid production and maintenance employees of Parker Seal?

A., Yes sir.

Q-56. That was made after 1970?

A., Yes sir, I'm sure that that's right. I don't recall the colors but I'm sure that's right.

MR. BENNETT CLARK: Your Honor, I would like to ask that these be introduced into evidence as Company Exhibits I and II.

MR. JAMES A. CRUMLIN: No objection on the particular issue. Let me see those just a second.

MR. BENNETT CLARK: Your Honor, I will do my best to find a 1968 one, we've got plenty of 1970's.

[73]

Q-57. Mr. Cummins, prior to joining the World Wide Church of God, I believe you testified, you knew that your work at the Parker Seal Company would require that you often or many times work on

Saturday, didn't it, in your position as Foreman of Banbury?

A., We were informed as a group by the, I suppose, Vice President of the Parker Seal Company that we were going to be a forty (40) hour a week Company at the Boone Tavern Hotel in a meeting by the Company officials.

Q-58. I'm asking you about past practice, Mr. Cummins, not what somebody told you at a meeting. I'm asking you if your past experience at the Parker Seal Company, over the ten and a half (10-1/2) years that you had worked prior to joining the World Wide Church of God, were you aware of the fact —

A., I knew that there would be Saturdays when there was work scheduled because of emergency orders, breakdowns and what have you of that nature, yes, I knew there would be Saturday work scheduled.

Q-59. And after the meeting that you have mentioned there was Saturday work scheduled, wasn't there?

A., Yes sir.

[74]

Q-60. And isn't it a fact that there was regularly scheduled work at the Parker Seal Company, when you were required to be there, which happened to fall on your holy days,

Wednesdays or Fridays or Mondays or — that work was regularly scheduled then?

A., Yes sir.

Q-61. You were aware of that fact before you joined the World Wide Church of God?

A., Yes sir.

Q-62. Now, perhaps this goes without saying, Mr. Cummins, but it is a fact that it was a change in your religious state as opposed to the Company policy which caused you to stop working on the period from sundown Friday to Saturday and the days during the year which your church regards as holy days?

A., Yes sir.

Q-63. It's here that you testified, under examination by Mr. Hogan, that a Supervisor in the Stock Prep. Department, a Mr. Chester Webb, to quote you, you said, "which he volunteered to work in my place", were you referring about Saturday work in the Banbury?

A., Yes sir.

[75]

Q-64. You're stating that he volunteered to cover for you in the Banbury after you joined the World Wide Church of God.

A., Yes sir, on numerous occasions.

Q-65. In your opinion could the Banbury Department be operated as efficiently and safely and as well with the Stock Prep. Foreman supervising on Saturday as it could if you had been there?

A., With the proper scheduling the efficiency could be as great. As far as the safety factor, the Supervisor being present would not eliminate any hazards that might exist from the machinery, as far as a mechanical breakdown or something. I've been standing beside men when machinery broke down, they couldn't stop the machine and prevent the breakdown, I couldn't have either.

Q-66. Now, would you schedule as work orders came in day by day?

A., Normally I scheduled — the orders that came in were scheduled that day or the following day, depending on how large the orders were.

Q-67. But you'd never be able to schedule — you could only just schedule about one (1) day ahead?

A., Well, normally you wouldn't schedule more than one (1) day or a day and a half at the most.

[76]

Q-68. I noticed that Reverend Barfield said that the period of October of 1971, that the 10th and 11th of October were considered holy days. That

is a Sunday and a Monday, the 9th was a Saturday so you would have been off three (3) days during that period. If there was no other Foreman in Banbury how was that handled?

A., Well, that was during my vacation period or it was scheduled to be my vacation period and there should have been a man training to take my place.

Q-69. Did you take your schedule in bits and pieces as you went along?

A., No sir, normally I took my vacation in September and October because of the eight (8) day period of the Feast of Tabernacles and the Last Great Day.

Q-70. What would you do in April when you had two (2) holidays back to back?

A., I don't recall ever having two (2) that ran back to back.

Q-71. The 9th and 10th of April, the 16th and 17th of April?

A., That would have been on a weekly Sabbath, one (1) of those days. And with — I could schedule as much as three (3) days ahead if I had the proper planning which —

[77]

Q-72. Now, if an emergency order came up, of

course, you wouldn't be there, so it would just have to wait, wouldn't it?

A., No sir, we didn't receive orders on a Saturday, we received the orders through the —

Q-73. I'm talking about on a Friday or on a Monday?

A., Well, the man in charge could take the order, he had the authorization to make any change in schedules as he needed to do so.

Q-74. After you joined the Church of God and you stopped working on Saturdays and on the days that your church regarded as holy days, was your pay or any of the benefits that you received from the Company reduced?

A., No sir.

Q-75. Did you ever offer to have the Company reduce your wages in sort of a pro-rated part for the Saturdays that you were missing?

A., No sir, I didn't suggest it to the Company, I suggested they let me fill in in other positions to make up the time off.

Q-76. Did you ever regard it as sinful to collect wages from an employer who required another employee to work on Saturday?

[78]

MR. THOMAS L. HOGAN: Objection, I don't think that's a relevant question because it assumes that there's some other individuals —

MR. BENNETT CLARK: Your Honor, that question was asked and presented in the case of Dewey vs. Reynolds Metal Company in front of the Supreme Court.

MR. THOMAS L. HOGAN: I don't see where this should be taken into consideration.

MR. JAMES A. CRUMLIN: Will you repeat the question again for the members of the Commission?

MR. BENNETT CLARK: Certainly.

Q-77. Did you regard it as sinful to collect wages from an employer, if you were on salary, that is, if you received your wages whether you worked or not, to collect wages from an employer who required that other employees work on Saturdays to help them earn profit?

[79]

A., No sir, I'm not qualified to —

MR. THOMAS L. HOGAN: Excuse me, Your Honor, I would object on the grounds that since it's

already established that this man was a salaried employee, that he got paid whether he didn't work because he was sick or whether or not he was on a vacation, whether he was attending a funeral or whether he was off because it was the Sabbath. To say whether it was sinful —

MR. JAMES A. CRUMLIN: I think the last part is the part that hasn't been established and is what he wants him to answer now.

MR. THOMAS L. HOGAN: Well, the question is, he just said the Company didn't say they were not going to pay him, he was paid a salary, that was something that the Company decided. For him to decide whether or not it was sinful for the Company to do so, if by paying him —

MR. JAMES A. CRUMLIN: Well, it is whether he, himself, thought it [80] was sinful to receive this money.

MR. BENNETT CLARK: Your Honor, he's answered it so I won't pursue it anymore.

MR. JAMES A. CRUMLIN: I think that since he's answered it we ought to move on to something else.

Q-78. Mr. Cummins, I believe that you stated that there were some occasions or they may have been a few during the year when the Banbury worked on Saturdays and when the Stock Prep. Department did not work on Saturdays, is this true?

A., Yes sir, this is true, there was —

Q-79. And did Chester Webb fill in, to the best of your knowledge, on those Saturdays?

A., Yes sir, as far as I know unless he could have — maybe he could have been on vacation and his replacement might have worked.

Q-80. Do you know if Mr. Webb attended church?

A., Sir, I can't answer that.

Q-81. Whatever his faith, if he had any faith or no faith at all, he was required to work on Saturdays so that you could attend your church's services?

[81]

MR. THOMAS L. HOGAN: Objection. Mr. Webb would be required to work when Mr. Webb was assigned to work.

MR. BENNETT CLARK: He stated that Mr. Webb —

MR. THOMAS L. HOGAN: He doesn't know why Mr. Webb was assigned to work by the Company. Mr. Webb will be a witness, you can ask Mr. Webb why he was assigned.

MR. BENNETT CLARK: If Mr. Webb was assigned to work, Mr. Cummins has not testified to

the fact because he testified that Mr. Webb volunteered. Now, either Mr. Webb volunteered or he didn't, so we've got a real problem here.

MR. JAMES A. CRUMLIN: Let him answer.

Q-82. The fact is that Mr. Webb was assigned to work on Saturdays, wasn't he, to cover for you?

A., He would come to me and tell me that, I'll work for you anytime that you need to be off. He said, I don't care to fill in for you on Saturdays because I'm not doing anything. So I took that as a [82] volunteer.

Q-83. I believe that you testified that there were, what, nine (9) or ten (10) people on the first shift of the Banbury Department?

A., Yes sir.

Q-84. How many were on the second? Four (4) or five (5)?

A., There was usually five (5) sometimes more, sometimes it might even be down to two (2) people on the second shift due to an emergency reason or something of that nature, but normally there was five (5), six (6) people.

Q-85. Now, we have introduced into the record here the two (2) contracts, the 68 and 70 contracts, of the Parker Seal Company. I would like to read from Page Three (3) of these contracts. "Employees are —

MR. JAMES A. CRUMLIN: Which contract are you reading from?

MR. BENNETT CLARK: I'm reading from the 1968. Your Honor, they're identical, rather than bore the Commission by reading both of them I'll read one. Simply what happened is, if I may just state this for the [83] record so there won't be any confusion, the Company just adopted certain stock provisions that appear in all the Union contracts. And the overtime provision is of that type. O.k., reading from Article IV, Hours and Overtime, Section 2, Sub-paragraph D. "Employees are expected to work overtime when requested by the Company unless excused by the Company in advance for valid reasons. Whenever possible, employees will be notified about daily overtime on the preceding day, and will be notified about Saturday work on the preceding Thursday".—

MR. JAMES A. CRUMLIN: Mr. Clark, do you have a question from this?

MR. BENNETT CLARK: Yes sir.

MR. JAMES A. CRUMLIN: What's the purpose of reading of this contract since he was not covered by the contract?

MR. BENNETT CLARK: I want to show, Your Honor, that the Company did not make a practice of scheduling Saturday work if they were not required

to because they [84] were required to pay time and a half wages for all work on Saturday.

MR. THOMAS L. HOGAN: He stated that before, that they paid time and a half on Saturday.

MR. BENNETT CLARK: Well, just to get it into the record, Your Honor. If that's sufficient that's all.

MR. JAMES A. CRUMLIN: Do you have further questions?

MR. BENNETT CLARK: Yes sir, I do, if I may have just a minute, please.

INTERROGATION BY MR. JAMES A. CRUMLIN.

Q-1. Sir, this Church of God, the World Wide Church of God, is that a national church or is it just one (1) building or do you have several locations?

A., Well, it states world wide and that's what it is, in effect. We have ministers in all corners of the world, so to speak.

Q-2. And the Lexington church is the closest one to your residence?

[85]

A., At the present time, yes sir.

Q-3. How many do you have in Kentucky?

WITNESS: How many churches?

MR. JAMES A. CRUMLIN: Yes.

A., We have a church in Bowling Green, Kentucky; Louisville, Kentucky; Covington, Kentucky and Lexington, Kentucky.

Q-4. Now, one (1) other question while Mr. Clark is getting ready, did you ever go to the Company and ask them if they would permit you to put up a schedule or suggest a schedule to them whereby you might take in your church Sabbaths and other church holidays? Did you ever propose this to them or you just told them what you'd like them to do?

A., Well, sir, I suggested to my superiors a method of meeting the required production by being more efficient in the Department and then it would not have been necessary to work on Saturday. We could have actually —

Q-5. You mean for you to work?

[86]

A., Well, for the whole Department.

Q-6. How far would that reviewed, or how far did your position carry you to the top level of policy making and decision making in the Company?

A., I was allowed to make suggestions, as far as decisions, they were at a lower level, as a shift Foreman or Supervisor matter.

Q-7. Well now, let me try to get this thing straight. The Company itself decided and determined whether or not Saturday work was necessary?

A., Yes sir.

Q-8. And you did not ask them if they would work out a schedule or let you submit a schedule that would permit you, yourself, to be off at that time?

A., I volunteered to fill in at any other time in any other department that I could to make up the time that I missed.

Q-9. If these orders are made up one (1) or one and a half (1-1/2) days, how would the orders be made up or filled if you were off at that time?

A., Well, I always made the orders up in advance. I planned my work to have this done by the end of the week or ether the, you know, on a forty (40) hour work week, Friday afternoon I would have all [87] this work done up and the schedules made out for Saturday work if it was necessary.

Q-10. Did you ask the Company if you might have a job other than Supervisor?

A., No sir, they told me that I could not be transferred because it would be a downgrade and that was out.

MR. BENNETT CLARK: Thank you, Your Honor.

CONTINUED INTERROGATION BY MR. BENNET CLARK.

Q-86. Mr. Cummins, you didn't ask, did you? Mr. Haddock just said that he couldn't but you didn't actually ask him for a downgrade, did you?

A., No sir, I never asked to be downgraded.

Q-87. Now, do you know what bookings are?

A., Well, I have a fairly good idea, I suppose. That's the sales as they come in from the sales representatives to our Company.

Q-88. And are goods at the Parker Seal Company produced as the bookings come in?

A., Yes sir, I suppose they are.

Q-89. Does your religion say that you must attend your church on every Sabbath or you must go out, or can [88] you attend eighty-five percent (85%) and remain in good standing?

A., If I have a valid reason for not being able to get there they would not disfellowship me or put me out.

Q-90. But work is not a valid reason?

A., No sir, in the twentieth (20th) chapter of Exodus it says, "you shall work six (6) days and on the seventh (7th) you shall rest". Saturday is the seventh (7th) day.

MR. BENNETT CLARK: I have no further questions for this witness.

INTERROGATION BY MR. FRED ANHOUSE.

Q-1. You say you were familiar with the Union contract that was presented as evidence?

A., Yes sir, at the time.

Q-2. What is the coverage in the contract, or is there coverage in the contract and the people coming under that contract as to time employees that they have to take off for religious reasons, are they allowed to do that?

A., Yes sir.

Q-3. Alright, what happens, do they get penalized by [89] less pay, or what?

A., No sir, they're not paid for the time they don't work.

Q-4. They're not paid, they're paid only for the time that they would work?

A., Yes sir.

Q-5. You drew pay though, you drew the same salary?

A., Yes sir.

Q-6. Even though you didn't work on Saturday. Did you offer the Company that you would take less for not working on Saturday?

A., No sir, I did not suggest that.

Q-7. How about this Mr. Webb that was filling in for you, had he been sick or had to take off on Saturday at anytime during this time?

A., Not that I recall, sir.

Q-8. Not that you recall. I don't know if this question would be in order. Would your conviction then have allowed you then to have — if he had taken sick, could, maybe, that you would have had to go in in an emergency status and had to do the job?

A., No sir.

Q-9. What are the hours that your services are held?

A., The scheduled hours are from 2:00 until 1:00 o'clock in the afternoon. Sometimes it runs over a little [90] bit longer.

Q-10. Let me ask you another question. What happened during the other holidays such as Easter and Christmas and so forth, do you observe them?

A., No sir.

Q-11. You don't observe them but you got paid when you took off on those holidays?

A., I drew a salary whether I —

Q-12. And was off in the normal part of the operation?

A., Yes sir.

Q-13. They were closed on those certain days?

A., Yes sir.

MR. FRED ANHOUSE: I think that's all.

MR. JAMES A. CRUMLIN: Dr. Lasley, do you have questions?

DR. A. R. LASLEY: Yes.

INTERROGATION BY DR. A. R. LASLEY.

Q-1. I'd like to ask Mr. Cummins, what effect did your absence have on production?

A., I don't think my absence on Saturday would have [91] effected production because of the scheduling and the training that the men under me had had. With the graphs and charts they knew that I knew whether they had worked or not on a Saturday and they were well trained to do the job and they did the job.

Q-2. I believe you said that one (1) gentleman volunteered to work when you were absent. Would this man be able to perform the duties essentially as you?

A., The only duties that he would have to perform in filling in for me would be to, should there be a breakdown or some emergency situation arise, he would call the Maintenance Department, and just to see that the personnel was on the job. The schedule was already made out, the material was already designated to its destination before the shift ever started.

Q-3. Where do you work now, Mr. Cummins?

A., I'm working in Lexington as a carpenter.

Q-4. What days of the week do you work?

A., I work Monday through Friday except on an annual holy day.

MR. JAMES A. CRUMLIN: Next is Mrs. Rosenbaum.

[92]

INTERROGATION BY MRS. IRVING ROSENBAUM.

Q-1. At some point, Mr. Cummins, you indicated that you took off on a Saturday just the amount of time it took to take your family to the church service. And I gathered you worked the rest of that Saturday, that was prior to your joining the church but when you still observed the holidays?

A., Yes ma'am.

Q-2. After you joined the church, though, you felt that it was necessary for you to be off the entire Saturday not just the hours of the service?

A., Yes ma'am, after becoming a member, why, I felt obligated in my own convictions to observe the Sabbath.

Q-3. In total?

A., Yes ma'am.

Q-4. Alright, the other question is a completely different question. Does the Union, do you know whether the Union contract prevents a downgrade?

A., I wasn't covered by the Union contract.

MRS. IRVING ROSENBAUM: Regardless, o.k. That's all.

[93]

MR. FRED ANHOUSE: Are you salaried now or are you working by the hour?

A., By the hour.

MR. FRED ANHOUSE: By the hour.

MR. JAMES A. CRUMLIN: What is the difference in salary?

A., Well, there's a considerable amount, close to three dollars (\$3.00) an hour as figured on an hourly basis.

MR. FRED ANHOUSE: Are you using a forty (40) hour basis?

A., I work forty-five (45) hours a week now.

INTERROGATION BY MR. THOMAS L. HOGAN.

Q-1. I just want to clear up one (1) point. When you were talking about scheduling, and I think this is what you said before, but you scheduled the inventory for Saturday on the Friday before or Thursday, or it was done before that actual Saturday?

A., Yes sir.

[94]

Q-2. And then what, did the men just come in and follow the schedule that you had left?

A., Yes sir, unless there was an emergency or some situation come up for deviation, they followed those schedules.

Q-3. What do you do on your Sabbath as far as, what could be done?

MR. JAMES A. CRUMLIN: Well, I think we know.

MR. BENNETT CLARK: I think that's been covered, Your Honor.

MR. JAMES A. CRUMLIN: Yes, I think that's been covered.

MR. THOMAS L. HOGAN: Alright, I have no further questions.

MR. BENNETT CLARK: Your Honor, I just have one thing.

INTERROGATION BY MR. BENNETT CLARK.

Q-1. Mr. Cummins, you said the Union contracts had something to do with religion. Is this the section to which you referred? I'm reading from Article I, [95] Section 4, Non-Discrimination Clause. "The Company and the Union agree that for all purposes of this contract, there shall be no

discrimination because of race, creed, color, national origin, sex, age or marital status".

WITNESS: Would you repeat the question, please? Not what you read, just the question.

MR. BENNETT CLARK: You indicated that there was something in this contract relating to religion, that was the way I under --

MR. FRED ANHOUSE: I had asked him the question, was there anything in the Union contract -- of course, I know that he was not covered, but the other employees, were they allowed to take off on their religious holidays and what was their penalty for it. And he said, well they worked by the hour, they would only get paid for what hours they worked. They could take off if they had to.

WITNESS: They were not forced to work on, like, a Sunday and --

[96]

MR. FRED ANHOUSE: This was my understanding when he answered the question that I had asked.

MR. JAMES A. CRUMLIN: Any further questions?

REVEREND C. L. FINCH: Somebody said the reason why they didn't schedule Saturday work was because it was time and a half.

MR. BENNETT CLARK: Pardon me, sir, I said that's the reason we tried to avoid scheduling it.

MR. JAMES A. CRUMLIN: But sometimes it became necessary and you had to?

MR. BENNETT CLARK: Yes sir.

MR. FRED ANHOUSE: Did the plant work some Sundays?

A., In an emergency situation.

[97]

REVEREND C. L. FINCH: Did it happen very often?

A., I couldn't tell you exactly how many times, but if you had a major breakdown of a machine you may be forced into a Sunday situation maybe for one (1) Sunday or two (2) or three (3) in a row, depending on how serious the mechanical failure was.

MR. FRED ANHOUSE: Let me ask you this one (1) question. The people that, let's say, that would be observing Sunday as their Sabbath, if this situation occurred they would have to come in and take care of the situation so you could roll on Monday, right?

A., No sir, they would not, I had two (2) men

who worked under me who would not work on Sunday.

MR. FRED ANHOUSE: And what did the Company do about it?

A., Nothing, they granted them permission to be off.

MR. JAMES A. CRUMLIN: Any other questions?

[98]

MR. BENNETT CLARK: Yes sir.

INTERROGATION BY MR. BENNETT CLARK.

Q-1. Mr. Cummins, what rate was required to be paid to any employees, hourly employees, who worked on Sundays?

A., Hourly employees was double time.

Q-2. And Saturday it was time and a half?

A., Yes sir.

Q-3. Now then, isn't it a fact that when emergency work was scheduled for Sunday that employees who refused to work on Sunday, that is, hourly paid employees who refused to work on Sunday, were charged with their refusal to work on Sunday as overtime being worked for purposes of any future overtime they might want to work?

A., Yes sir, also, if they refused overtime on a Monday, Wednesday or a Friday or Saturday, yes.

Q-4. Isn't it a fact that they were treated the same as anybody else for anytime that they refused to work overtime?

A., Yes, they were treated exactly the same except they were not forced to work on their religious Sabbaths.

Q-5. But they were not accommodated, were they, in that [99] they were charged —

MR. THOMAS L. HOGAN: Objection.

MR. JAMES A. CRUMLIN: I think that's a legal opinion.

Q-6. It's a fact also, isn't it, Mr. Cummins, that Sunday work was never scheduled, Saturday work was scheduled overtime but Sunday work was not considered scheduled overtime, so people could choose whether they did or did not want to work on Sunday?

A., When the Banbury worked on a Sunday, normally it was scheduled by a posted bulletin not later than Wednesday afternoon.

Q-7. Those people who did not work were charged with overtime?

A., Yes sir.

MRS. IRVING ROSENBAUM: What does that mean? Charged?

MR. BENNETT CLARK: That means — I don't know if I can answer that or not.

[100]

MRS. IRVING ROSENBAUM: Can you ask the witness?

Q-8. What does it mean to be charged overtime, Mr. Cummins?

A., Well, we kept a running total of the number of hours of each employee's overtime, either worked or refused to work, so that we could treat them fairly as far as — if we only needed two (2) men and we had ten (10) of equal classification, we offered the overtime available to the lowest number of hours that the men had worked to try to keep it equal and fairly distributed. That was in the contract.

MRS. IRVING ROSENBAUM: So it was counted whether they refused or not?

A., Yes ma'am, it was just to fulfill the contract as far as an obligation the company had made.

MR. FRED ANHOUSE: Overtime began after how many hours of normal work?

A., Eight (8) hours a day, forty (40) hours to a week.

[101]

MR. FRED ANHOUSE: Alright, if somebody worked forty-one (41) hours — let's say, if he worked one day nine (9) hours and he worked the next day seven (7), would you get overtime for the nine (9)?

A., One (1) hour, yes, consists of overtime.

MR. FRED ANHOUSE: Even though he'd only worked seven (7) the next day?

A., Yes sir.

MR. FRED ANHOUSE: It wasn't the total hours of the whole week?

A., No sir, it was computed on anything over eight (8) hours —

MR. FRED ANHOUSE: Per day. How many hours did you work every day on the average?

A., It would just depend, I was always there at least eight and a half (8-1/2) hours, sometimes as many as twelve (12), thirteen (13) hours, depending on [102] what was necessary.

MR. JAMES A. CRUMLIN: Any further questions of this witness?

MR. BENNETT CLARK: No sir.

MR. JAMES A. CRUMLIN: That's all. Thank you so much for being here to testify.

* * * * *

[104]

The witness after first being duly sworn, deposed as follows:

INTERROGATION BY MR. THOMAS L. HOGAN.

Q-1 Would you state your full name and address, please?

A., Conley Saylor, Berea, Kentucky.

MR. JAMES A. CRUMLIN: How do you spell that Saylor?

A., S a y l o r.

Q-2. And what is your employment, Mr. Saylor?

A., I own and operate a supermarket.

Q-3. Did you at one time work at the Parker Seal Company?

A., Yes, for almost sixteen (16) years.

Q-4. And what period of time was that?

A., Oh, from 1955 till July the 1st, 1971.

Q-5. In what capacity were you employed?

A., Pratically all of them up to Plant Manager.

Q-6. And how long were you in the position of Plant Manager?

A., A total of about two and a half (2-1/2) years.

Q-7. And what would be the dates on that?

A., Sometime in 1969 to July 1st, 1971. I don't recall the exact dates of it, I think it was about [105] May the 20th, 1969.

Q-8. And this was in Berea?

A., No, about seven (7) or eight (8) months of this time I spent in Lexington.

Q-9. What period were you in the Berea plant?

A., From about May 20th, 1969 till November the 16th of 1970, I believe.

Q-10. And during that time was Paul Cummins employed there?

A., Yes, he was.

Q-11. And he was employed as the Banbury Supervisor?

A., Yes.

Q-12. So he worked under you?

A., Yes.

Q-13. And did you have any reason to have any conversation with Mr. Cummins about his religion?

A., I knew that Paul had been leaving at 1:00 o'clock on Saturday afternoon to take his wife to Lexington for some time. And, I guess, you could

say it was close to July of 1970 that Paul missed a couple of Saturdays. And he came to me one Monday morning and offered an apology to me for doing as he had done. Then he went ahead and told me that he had been converted into this World Wide Church and that he had been missing on Saturday for that reason. That it was now his belief that he would no longer [106] work on Saturday and he was very apologetic for not having told me in advance. And he went on to tell me, you know, that the decision was mine to make at that time, that I could either fire him, I could transfer him or do whatever I wanted to. That he would abide by what decision that I would make. At that time the Lexington plant was on strike and the Berea plant was trying to carry the whole load at that time. And I told Paul that, well, things being as they are and the situation that we're in, why, we would just go with that at the time and cross that bridge later down the road.

Q-14. Go with what?

A., With trying to relieve him on Saturday. Let him go ahead and be in charge of the Banbury operation through the remaining portion of the week. But Paul also told me at that time, he said, now, I won't work on Saturday at all but if you want me to I'll come in and work Sunday or any other hours that you ask me to irregardless of what they might be.

Outside of Saturday I'll work any hours that you request that I do so.

Q-15. And did you have any cause after that to ask him to work other hours, extra hours?

[107]

A., Well, at that time, Mr. Attorney, all of us was working from fourteen (14) or sixteen (16) hours a day. The Lexington plant being out of operation, there was no way that any of us could short cut to eight (8) hours a day. It was utterly impossible. And we were in the midst of vacation schedules for Supervisors, plus in June prior to that July we had had to lay off twenty percent (20%) of our operating force, so we were operating at a very low peak of management people at that time. And it was just impossible for anybody to try to get by on eight (8) hours a day. So, yes, Paul was, he was working from ten (10) to twelve (12) practically all that time as well as the rest of us.

Q-16. What arrangements were made as far as the Banbury operation on Saturday when Paul was not there?

A., Well, I don't recall those specifically but I was reminded out in the hall there while we were waiting that I had asked a fellow by the name of Lawrence Reynolds to cover some of this. And after I was reminded of it, I do recall it. And Chester

Webb said that I asked him to cover part of it, I don't recall that at all but he said I did. So many things was happening at that time that this didn't seem [108] nearly as important as trying to meet production schedules, as this did.

Q-17. Did you or do you remember that it was necessary to have an extra person come in, an extra Supervisor, to cover the Banbury Department on Saturday?

A., Really, I don't remember it actually, because it's always been kind of a set up down through the years that if the Banbury Supervisor was not there the Stock Prep. Supervisor covered both sides of it.

Q-18. And during this time did you have any second or third shift in Banbury?

A., During this time we had a second shift and I really don't recall if we had a third shift or not.

Q-19. Was there a separate Supervisor for the second shift Banbury?

A., Practically all down through the years the second shift Stock Prep. Foreman has looked after the second shift Banbury and so be it if there be a third shift.

Q-20. Why is that? Is it that it's not necessary to have a Supervisor in the Banbury?

A., Well, normally it's a three (3) or four (4) man crew and I don't think the Company could afford to have a Supervisor for three (3) or four (4) men.

Q-21. Was it necessary to have the Banbury Supervisor, [109] in this case Mr. Cummins, come in any earlier? Was there any overlap in shifts in the Banbury Department?

A., Paul's normal shift, during this period of time, would start normally around 7:00 o'clock of a morning and end somewhere between 5:30 and 7:00 at night. Now, there were times when he would come in early of a morning, say 5:00 o'clock and not necessarily to look after his own men but to see that everything was going well. To see, if there was people there on the third shift, that they were scheduled properly. And there was never a mandatory set up. Normally, if they had a third shift the Stock Prep. Supervisor would look after that shift. Or in some instances if the first shift came in at 3:00 o'clock or 5:00 o'clock in the morning the third shift Supervisor would also look after those. It was not mandatory that Paul come in the very exact hours that his first shift employees came in.

Q-22. Why is that? What exactly did Paul do as Supervisor of the Banbury?

A., Paul, as Supervisor of the Banbury at that point in time, he scheduled the total Banbury

operation, which included the rubber that was coming out of Winchester, [110] also directly supervised the first shift and correlate with the second and third shifts, if there be second and third shifts, correlate the schedules.

Q-23. So you say that he set up the schedules for all the shifts?

A., Primarily so, yes, they could be altered but he initiated the first schedule.

Q-24. How would you, in your position as Plant Manager, rate Paul as a Supervisor in the operation of Banbury?

A., Well, I would rate Paul as doing a satisfactory job. It's the position, the one he was doing then of scheduling Berea and Winchester, it was almost a thankless job to do it and it was very complicated and I thought he did a very adequate job in it.

MR. THOMAS L. HOGAN: I don't have anymore questions at this time.

INTERROGATION BY MR. BENNETT CLARK.

Q-1. Mr. Saylor, how long were you Plant Manager of the Berea plant of Parker Seal?

A., It was approximately from about May the 20th of 1969 up until sometime the 1st of October of 1970. The [111] upper echelon of Parker Seal Company had changed. The first upper echelon

person to leave was the Vice President and then the President and then the Division Manager and a new Vice President, Mr. Sample, came before it and he sent over John Barton as Acting Plant Manager sometime around the 1st of October, 1970.

Q-2. And was that when you went to Lexington?

A., No, it was about four (4) or five (5) weeks later, November the 16th was when I went to Lexington.

Q-3. Now, in your job as the Plant Manager, am I correct in saying that you had many opportunities to observe Supervisors?

A., Absolutely. Every day.

Q-4. And did you develop any sort of a philosophy as to what the job of a Supervisor was supposed to be in regard to the people with whom he was working?

A., Well, I think everybody has to develop that philosophy.

Q-5. Would your philosophy run anything like, a Supervisor's job is to supervise his people, to be with them?

A., I don't see how he could do anything else other than the circumstances may alter that a little bit. That would be just like saying to me, as Plant Manager, would have to be there twenty-four (24) [112] hours a day because I had a Supervisor on the third shift.

Q-6. Well, I'm talking with his shift, what would be a Supervisor's responsibility?

A., Well, I'd say it would definitely be, in most cases, that he would have to be there all the time.

Q-7. What should be his contact with the men who are his responsibility?

A., Well, it would definitely depend on the situation, it would have to be a person to person contact but sometimes you could delegate it through a second person.

Q-8. Mr. Saylor, Mr. Cummins has testified that apparently in April, sometime around there, 1969, and then you have testified this, he would take off the latter part of his shift to take his wife to church over in Lexington?

A., April, I couldn't testify to that —

MR. BENNETT CLARK: Well, the dates aren't that important.

WITNESS CONTINUES: But I know that it was for some period of time.

Q-9. And then approximately a year later, maybe a year and [113] several months later, he joined this church, as I understand it, or he told you that —

A., Well, it was some period of time later, I don't know how long. O.k., it was a pretty lengthy

period of time I know that he took off on Saturday when it was scheduled.

Q-10. Now, do you know what bookings are? Order bookings are?

A., I sure do.

Q-11. What was the method by which Parker Seal Company, which your plant in Berea, determined prior to the time that Mr. Cummins started going over to this church, let's say, in April of 1969, what method did the Parker Seal Company use to determine whether or not there would be Saturday work in the plant as a whole, if you will, and in the Banbury specifically, whether or not Saturday work would be required?

A., The schedules made in their department computes their work loads, are all computed each Wednesday and that was determined by that.

Q-12. By what?

A., The amount of work that the Division or the Kentucky operation had as a total.

Q-13. If you know, what was the Division work load based upon?

[114]

A., Well, it was based on the number of open orders in the shop plus out a certain period of time,

divided by the total number of days it would take to relieve those orders.

Q-14. Based upon essentially the orders that came in, the products to be produced?

A., Right.

Q-15. After Mr. Cummins joined the Church of God what was the basis for determining whether or not Saturday work or work on any other day be required?

A., Well, at that period of time, with the Lexington operation on strike, why, it was just an automatic thing that the Berea plant would be scheduled every Saturday. But —

Q-16. Well, let's take just a normal situation. Were there any changes in the method by which it was determined Saturday work would be necessary between the time that he joined the Church of God and after the time he joined the Church of God, were there any changes at all?

A., None that I recall.

Q-17. Mr. Saylor, do you remember that on a day somewhat likened to the day outside, when it was cold and dreary, Mr. Dutch Haddock and I came to see you [115] at your home in Berea, I think it was in December?

A., I recall that day.

Q-18. This was at the time, as I remember, when you were in the process of building your store?

A., Yes.

Q-19. We visited you in your living room?

A., Yes.

Q-20. I think it was in mid-morning, do you remember that occasion?

A., Yes, I do.

Q-21. And I told you that I was representing Parker Seal Company in a matter that was pending before the Human Rights Commission?

A., Yes sir.

Q-22. And that I was trying to talk to everybody to find out what the situation was. Do you remember at that time making a statement to Mr. Haddock and me that — to the best of my memory, and I'll try to quote it — "if I had remained at the Berea plant I would have had to do something because of the way Cummins' not working on Saturdays effected the other Supervisors"?

A., I think that that would have been the decision that any Plant Manager would have been faced with. That [116] eventually, even though with Paul sitting there, it would have been a decision that somebody would have had to make, whether it be me, Dutch or whoever it might be.

Q-23. What kind of a decision are you talking about?

A., A decision that effects his status at work. Now what it might be — now, don't ask me what that decision is because if I would have been making it, I don't know what it would have been. Whether it would have been transferred to some other job or what have you, or into another operation within the Company, I don't know. But I do think a decision would have to be made concerning that particular thing.

Q-24. Did you make the statement to Dutch Haddock and me because Cummins' situation of not working on Saturdays and apparently the holy days was effecting the operation of this plant?

WITNESS: Would you restate that?

MR. BENNETT CLARK: Yes sir. Did you say to Dutch and me, when you made that statement, did you say that because, of some manner, that Mr. Cummins not [117] working on was effecting the operations of the Berea plant?

A., No, I made that statement to you realizing that in under a situation like that that I think a decision would have to be made. Because it would have to effect, eventually, if Paul was excused every Saturday and somebody was obligated to fill in for him, I think that decision would have to be made because it would effect the operation of the plant.

Q-25. Now, Mr. Saylor, I want to ask you another question. Again, this was a statement that

you made to Dutch Haddock and me. I'm going to read what I remember it to be and you just indicate whether or not you remember saying it. You stated that after you left employment with Parker Seal that in July — the Summer of 1971, and I believe you said July, that you were walking down a street in Berea and ran into Chester Webb, whose name has been mentioned here and was a Supervisor in the Stock Prep. Department. And that, I don't know whether you said that he took you by the arm or what, but that he invited you in or you all went in for a cup of coffee at a restaurant and you sat there and talked. And that Webb told you that he, Webb, was tired of having to [118] work so many hours —

MR. THOMAS L. HOGAN: Objection, that's hearsay. Mr. Webb is going to be a witness.

MR. JAMES A. CRUMLIN: Well, he's asking him if he made that statement.

MR. BENNETT CLARK CONTINUES Q-25:
— when Cummins was not even working Saturdays?
Your Honor, my authority for asking that question —

MR. JAMES A. CRUMLIN: Go ahead and ask the question.

MR. BENNETT CLARK: — is the case of Jett vs. Commonwealth, 436 Southwest Second, 788, which states that where the other person who allegedly made the remarks —

MR. JAMES A. CRUMLIN: Mr. Clark.

MR. BENNETT CLARK: Sir?

[119]

MR. JAMES A. CRUMLIN: We have ruled.

MR. BENNETT CLARK: Alright, sir. I just don't want a question of correct conduct.

MR. JAMES A. CRUMLIN: Did you or did you not, sir, make that statement?

A., O.k. Yes, I was uptown and I run into Chester and he said, let's go have a cup of coffee.

MR. JAMES A. CRUMLIN: Did you or did you not make that statement? We don't want you to relate it again, did you or did you not make that statement?

A., Yes.

MR. THOMAS L. HOGAN: Could you repeat the statement? I thought Mr. Webb had made the statement.

MR. BENNETT CLARK: He did.

[120]

MR. JAMES A. CRUMLIN: He's asking him, did you tell us that he told you, on that occasion, that he was tired of working.

MR. BENNETT CLARK: That Mr. Webb said he was tired of working, yes sir. Do you want me to repeat the statement?

MR. JAMES A. CRUMLIN: Yes.

MR. BENNETT CLARK: He told Conley that Webb was tired of having to work so many hours when Cummins was not even working Saturdays.

MR. JAMES A. CRUMLIN: He said he told you that. What's next?

MR. BENNETT CLARK: Yes sir.

Q-26. Mr. Saylor, as a result of your experience as the Plant Manager at Berea, would you consider it good operating procedure when the first shift Banbury, which had how many employees?

[121]

A., Approximately ten (10).

Q-27. The second shift had how many?

A., Oh, four (4) or five (5), somewhere in that vicinity.

Q-28. Would you consider it good operating procedure when the first shift Banbury had to be covered by the Stock Prep. Foreman?

A., You know, you have circumstances like that that are never a good operation, but you also have a situation where you have two (2) shifts and they're scheduled twelve (12) hours a day and you expect the first shift man to stay over two (2) or three (3) hours into the second shift and it's pretty

ridiculous to require him to come in at 3:00 o'clock and work till 6:00 or 7:00 that night.

Q-29. Well, I'm talking about the normal times, is it good operating procedure to have Chester Webb cover for him?

A., Under normal times, why, the things operate very much differently. We were not operating under normal times at this point in time.

Q-30. But I'm talking about under just normal procedure. Just assume normal procedure, would it be good procedure to have the Stock Prep. Foreman on the [122] first shift having to also cover first shift Banbury?

A., O.k., let me restate. Let me rephrase it differently. Let's say that Chester Webb would be absent and Paul was still employed in Banbury, if Chester was absent Paul would have to cover Stock Prep.

Q-31. Was that good operating procedure?

A., Absolutely not, but when you're operating at a minimum of people, you know, you just can't pluck them out of the air.

Q-32. But it wasn't good operating procedure?

A., Why, absolutely not.

MR. BENNETT CLARK: That's all the questions I have.

INTERROGATION BY MR. THOMAS L. HOGAN.

Q-1. When you say that it wasn't good operating procedure as you have indicated before, do you say it's not good operating procedure not to have separate Foremen in Banbury?

A., Look at it in this light, Mr. Attorney, we have two (2) Supervisors, one (1) to cover first shift Stock Prep. and one (1) to cover first shift Banbury. [123] If either of those people had to be away from the plant the other had to cover. And that's the way it has been for a number of years.

Q-2. As I understand it, you also had a second shift Stock Prep. Supervisor but not a second shift Banbury Supervisor?

A., Right.

Q-3. So the Stock Prep. always covered on the second and third shift because there was just no one assigned to Banbury?

A., That's true, with the correlation of the first shift Banbury Supervisor.

Q-4. After the time that Paul joined the church and was no longer working on Saturdays, while you were still Plant Manager, was there any noticeable decrease in the efficiency of the Banbury operation?

A., It was such a hectic time. There was not too many things that were obvious at that point in time because of this trying situation at that time.

Q-5. Do you remember any problems arising out of —

A., Not really, there could have been some problems among the people that was covering in Paul's place as —

Q-6. I'm talking about problems as far as the production [124] element of the Company, it's quite damaging to be responsible for the production output?

A., Well, there's always been problems with that Department, you know, period. It's been before that, it's been after that and I guess it will be, you know, for as long as the Parker Seal Company has a Banbury.

Q-7. But nothing related to —

A., Nothing related to Paul's situation.

Q-8. When you were saying that there — you said earlier that you knew that a decision would have had to be made about Paul?

A., Yes.

Q-9. Then you later related what Mr. Webb said to you, were you talking about a decision having to be made because of the effect on the other employees?

A., Absolutely, plus the effect that it could have on the Department.

Q-10. Did you receive any complaints about Paul not working on Saturday?

A., Not while I was there, no.

MR. THOMAS L. HOGAN: I have no further questions.

[125]

INTERROGATION BY MR. FRED ANHOUSE.

Q-1. How many Saturdays did the plant work per year? Could you give us an estimate?

WITNESS: During the year?

MR. FRED ANHOUSE: Yes.

A., Lengthy records indicate that approximately twenty-six (26) Saturdays a year are scheduled. Now, that is close but I don't state it as being the absolute.

Q-2. How many people work in the whole plant?

A., There are approximately six hundred (600) there.

INTERROGATION BY MR. VERNON JOHNSON.

Q-1. Mr. Saylor, from the time you became Plant Manager until you went to Lexington, now, during part of that time, if I understood the previous testimony as to Mr. Cummins' membership

in the World Wide Church of God, he was a full fledged member of this religious organization for several months during the time that you were Plant Manager, is that correct?

[126]

A., Well, it depends on what you mean by several. Let's say July, August and probably September.

Q-2. Say two (2) or three (3) months?

A., O.k.

Q-3. Now, at the time that he told you his reason for being absent on Saturdays and he wouldn't be able to work Saturdays because of religious beliefs, and you said, well, we'll just go for the time, or words to that effect, did you at that time have the authority to give that permission at that time?

A., Well, I thought that I did.

Q-4. Did your Superiors in Parker Seal Company know of your decision or did you tell them of your decision?

A., Mr. Johnson, I don't recall ever relating this to anyone. Now if I did, you know, Mr. Herman, the Personnel Manager there. I never recall relating this to anyone.

MR. VERNON JOHNSON: Thank you.

INTERROGATION BY MR. THOMAS L. HOGAN.

Q-1. I have one (1) further question. You stated that there were approximately twenty-six (26) Saturdays [127] worked a year?

A., Yes.

Q-2. Of those Saturdays how many of those did just the Banbury work and not the Stock Preparation, to your knowledge?

A., I couldn't even wager an educated guess on that. I know that there are some.

Q-3. Well, was it a small number, a majority of them?

A., No, it would not be the majority of it, it would be a smaller number.

Q-4. Normally then if Banbury works, Stock Prep. works too?

A., Not necessarily, you know, it depends on, there again, back to the work load that the other attorney was referring to. It depends on the situation each Wednesday, that determination has to be made on each and every Wednesday.

MR. THOMAS L. HOGAN: I have no further questions.

DR. A. R. LASLEY: I have a few questions for this gentleman.

MR. JAMES A. CRUMLIN: Yes sir, Dr. Lasley.

[128]

INTERROGATION BY DR. A. R. LASLEY.

Q-1. Mr. Saylor, during the time you were the Plant Manager did your plant operate on Sunday at anytime?

A., No sir, I don't recall ever having to schedule somebody on Sunday. Now, there could have been, and was some voluntary employees that worked on Sunday, yes, there were. But as far as scheduling, why, I don't recall any. If it was it was it wouldn't have been over one (1) or two (2) people.

Q-2. What are the normal working days of the plant?

A., The normal working days is five (5) days a week, the sixth day is to recover what didn't happen in five (5). But there were a lot of six (6) day weeks scheduled to handle the work load.

MR. JAMES A. CRUMLIN: Any further questions?

MR. BENNETT CLARK: No sir.

MR. JAMES A. CRUMLIN: Thank you very much, Mr. Saylor. Mrs. Smith, did you have questions?

[129]

INTERROGATION BY MRS. BELLE SMITH.

Q-1. Well that man asked there, and I said, well, there's just twenty-six (26) Saturdays, weren't there?

A., That's not an absolute number, the twenty-six (26), but it's approximately and it's close.

Q-2. Well, he indicated he felt like it was always, which I heard you to say it wasn't. I wanted to verify it to satisfy in my mind it was approximately twenty-six (26)?

A., Yes.

MR. JAMES A. CRUMLIN: Any other questions? Thank you very much, Mr. Saylor.

* * * * *

The witness after first being duly sworn, deposed as follows:

INTERROGATION BY MR. THOMAS L. HOGAN.

Q-1. Would you state your full name and address, please?

A., Oscar G. Fain, Mt. Vernon, Kentucky.

Q-2. And you're employed by the Parker Seal Company?

[130]

A., Yes sir.

Q-3. And are you related to Mr. Cummins?

A., Well, I'm his brother-in-law by marriage. I married his sister.

Q-4. How long have you been employed at the Parker Seal Company?

A., Ten (10) years in May.

Q-5. And what position do you hold there now?

A., Supervisor of Stock Prep. Department.

Q-6. What shift is that?

A., Third shift.

Q-7. And are you aware of the fact that Paul has been terminated from Parker Seal?

A., Yes.

Q-8. And to your own knowledge, do you know why he was terminated from Parker Seal?

A., Not really.

Q-9. And what is your position as far as it relates to the Banbury Department?

A., Well, we don't have a Banbury on third shift, is that what you mean?

Q-10. Was there ever a Banbury Department on third shift?

A., There has been but we don't right now.

Q-11. What do you do when you're the Stock Prep. Supervisor and there's a Banbury on third shift?

[131]

A., I'm in charge of Banbury on third shift?

Q-12. Is this standard procedure?

A., Yes.

Q-13. How many hours a week do you work?

A., Normally forty (40) hours.

Q-14. When there's a third shift Banbury operation what does your role as Supervisor of that Department entail?

A., Well, I'm in charge of the people and the production in that Department, in both Departments, Stock Prep. and Banbury.

Q-15. When you say you're in charge, do you schedule production in Banbury?

A., No. The Supervisor on the first shift schedules all the production, they schedule the work out and I'm just to see that it's done.

Q-16. And how much would you say of your time is spent, when you're the Supervisor in both Departments, how much of your time is spent in Banbury?

A., Probably twenty percent (20%).

Q-17. Now, do you work on Saturdays?

A., Yes.

Q-18. And what shift is that that you work on Saturday? This is in Stock Prep., right?

A., I work from 11:00 to 7:00 starting, it would be like [132] tonight, Friday night, from 11:00 o'clock until 7:00 o'clock Saturday morning.

Q-19. Have you ever had to work on Saturday afternoon?

A., Yes.

Q-20. And was this in Stock Prep.?

A., Banbury and Stock Prep. during vacations.

Q-21. And you supervised both?

A., Yes, I did.

Q-22. Now, I think at one (1) time there was — right around the time that Paul was fired, a few months preceding this, that would be last Summer, that there was quite a bit of overtime?

A., Yes.

Q-23. Did you work any overtime?

A., Yes.

Q-24. About how many hours did you work a week?

A., Well, some weeks seventy-two (72) hours, when we worked six (6) days, we worked twelve (12) hour shifts.

Q-25. And do you know what necessitated these long shifts?

A., Well, some of the Supervisors were on vacation.

Q-26. How many Supervisors are there in all?

A., I couldn't tell you right off.

Q-27. Were you aware that Paul was not working on Saturday?

[133]

A., Yes.

Q-28. Were you aware why he wasn't working on Saturday?

A., Yes.

Q-29. Did you have any conversations with Paul about the fact that he wasn't working on Saturdays?

A., No, not that I recall.

Q-30. Was any of the overtime that you were working, were you covering for Paul on Saturdays when he wasn't working?

A., Not necessarily, I don't think that I did,

no. See, I was on third shift at that time and he wouldn't have worked third shift anyway.

Q-31. Did Paul ever work for you when you were unable to come in?

A., Due to sickness, I think maybe he did one (1) week I was off three (3) days sick. Other than that I don't think so.

Q-32. Was he assigned to work this, if you know?

A., I don't really know that he did work. I just know that I was off and somebody had to cover, whether he covered or not, I don't know.

Q-33. Did Paul ever volunteer to work for you?

A., Yes.

Q-34. When was this?

A., It was last Summer, I can't tell you the exact date. [134] It was during those overtime hours, when I was working overtime.

Q-35. Did you ever ask him to work for you?

A., No.

Q-36. Why is that?

A., I didn't feel it was my place.

Q-37. Would you explain that, please?

A., I didn't feel like that it was my place to tell him to work for me.

Q-38. Well, was Paul then assigned to work for you, do you know?

A., Really I don't know whether he was or not. What do you mean by that?

Q-39. Well, were you told that Paul was supposed to cover for you?

A., I was told, I think that Mr. Haddock told me that Paul would fill in if I needed him, yes.

Q-40. And were you supposed to get Paul to fill in for you?

A., I don't know whether I was or not but I did tell Mr. Haddock that I didn't feel like that it was my place, if he wanted Paul to work to tell him and then he would work for him.

Q-41. Were there ever any specific times when Paul volunteered to work for you?

A., Yes, he volunteered two (2) or three (3) different [135] times.

Q-42. You say you felt it wasn't your place to ask him to do it?

A., Yes.

Q-43. Was there ever anytime when you did ask Paul to work for you specifically?

A., No.

Q-44. Was there ever a time when you were supposed to call Paul to work for you?

A., Yes, I told him one day that I might call him but I changed my mind, I didn't call him.

Q-45. Why did you change your mind?

MR. JAMES A. CRUMLIN: How far is this going?

MR. BENNETT CLARK: Your Honor, I'm sitting here trying to understand where this is leading.

MR. JAMES A. CRUMLIN: Alright.

Q-46. What's the procedure, if you know, when the Banbury operation starts early as far as who is assigned as supervisor?

[136]

WITNESS: What do you mean, the procedure?

Q-47. Was that — the Banbury shift is normally 7:00 to 3:00, the first shift?

A., Yes.

Q-48. Are there times when the Banbury shift starts before 7:00 in the morning?

A., Yes, on some occasions it starts at 5:00, the first shift does. On some occasions the second shift works over until 1:00.

Q-49. Now, do you know who supervises those extra hours in Banbury?

A., Sometimes I do and sometimes the Supervisor comes in.

Q-50. Has there been any problems among the Supervisors because of Paul's failure to work on Saturdays?

WITNESS: What kinds of problems do you mean?

MR. THOMAS L. HOGAN: Well, as far as was there any dissention among the Supervisors, was there any complaints?

A., Yes.

Q-51. What were those?

[137]

A., There was a few of the Supervisors that didn't feel like they should work for Paul on Saturdays.

Q-52. Did you feel this way?

A., Yes.

Q-53. Did you ever bring this to the attention of anyone at the Company?

A., Yes.

Q-54. Will you relate that to us, please?

A., Well, I talked to Mr. Haddock, Mr. Dutch Haddock, and he asked me how I felt about it and I

told him that I felt like that I respected Paul's religion but that if he was scheduled to work, he should work on Saturday.

Q-55. Was there any problem of Paul not working any other time but Saturday.

WITNESS: What do you mean by that?

MR. THOMAS L. HOGAN: Well, was there any other time when other people were working, other Supervisors were working when Paul wasn't.

WITNESS: Do you mean during the week?

[138]

MR. THOMAS L. HOGAN: Yes, besides Saturdays?

A., Not that I know of.

MR. THOMAS L. HOGAN: I think that's all I have.

MR. JAMES A. CRUMLIN: Do you have any questions?

MR. BENNETT CLARK: Just a couple.

INTERROGATION BY MR. BENNETT CLARK.

Q-1. Mr. Fain, if you know, what is the Company rule as to whether or not Foreman are required to come in with the hourly employees who

are assigned to their shift whenever the shift is working?

A., I don't know whether we have a rule like that or not.

Q-2. Well, do you know whether or not any sort of a notice was put on the board in March by Dutch Haddock stating that the Foremen would be on the floor when their men were on the floor?

A., I don't remember that.

Q-3. How many hours a week did you average during the [139] Summer of 1971, did you say?

A., 1971? For four (4) weeks straight I worked twelve (12) hour shifts. Four (4) straight weeks.

Q-4. Was that including Saturdays?

A., Well, we didn't work all four (4) Saturdays I don't think. But I think we maybe worked at least two (2) of them.

Q-5. You averaged seventy-two (72) hours a week then?

A., No, I say for at least two (2) of the weeks it was seventy-two (72) hours.

Q-6. At that particular time?

A., Yes.

Q-7. If you know, just from your observations, do you know how many hours a week Mr. Cummins was averaging then?

A., No, I don't really know. He worked, I'm sure he was only working five (5) days, now, how many hours he worked a day, I don't really know.

Q-8. Do you attend any church?

A., Yes.

Q-9. If I may ask you, what church do you attend?

A., Baptist Church.

Q-10. What day does that church have its preaching service?

A., On Sunday.

[140]

Q-11. Do you regularly attend church?

A., Yes.

Q-12. Have you ever been required to work at the Parker Seal Company on Sundays?

A., I think one (1) time, yes.

Q-13. Did you come in and work it?

A., Yes.

Q-14. Are you an exempt employee?

A., Yes.

Q-15. Which means what?

A., I don't get paid for Saturday and Sunday.

Q-16. What does it mean about working whenever you're called, is there any —

A., There's no more pay.

Q-17. You just work when you're called to work?

A., Yes.

Q-18. When you're scheduled to work?

A., Yes.

MR. BENNETT CLARK: That's all the questions I have, Your Honor.

MR. JAMES A. CRUMLIN: Any questions? Thank you so much, Mr. Fain, you may be excused. Would you call your next witness please?

* * * * *

[141]

The witness after first being duly sworn, deposed as follows:

INTERROGATION BY MR. THOMAS L. HOGAN.

Q-1. Would you please state your full name and address?

A., Chester Webb, 507 Prospect Street, Berea, Kentucky.

Q-2. And you're employed by the Parker Seal Company?

A., Yes sir.

Q-3. In what capacity?

A., Supervisor of Stock Prep.

Q-4. How long have you worked there?

A., This makes my ninth year.

Q-5. Your ninth year?

A., Yes sir.

Q-6. And how long have you been a Supervisor?

A., I think six (6).

Q-7. What shift are you working as Supervisor?

A., First shift in Stock Prep.

Q-8. That would be the 7:00 to 3:00 shift?

A., Yes.

Q-9. Are you ever required to work overtime? More than forty (40) hours?

A., Yes.

[142]

Q-10. Are you required to work on Saturdays?

A., Yes sir.

Q-11. This is in the same department, the Stock Prep. Department?

A., Yes, it is.

Q-12. Are you ever assigned to work or have you been in the past assigned to work overtime in any other shift besides Stock Prep, besides first shift?

A., Yes sir.

Q-13. When you work on Saturday in Stock Prep. do you also supervise the Banbury operation?

A., I don't now, no sir, I did.

Q-14. When did you do this actually? You did it and then stopped, what period did you do it?

A., Well, I don't know the exact dates. I did it when I came back into Stock Prep. I was in another department and brought back into Stock Prep. and Mr. Saylor said, the day they put me back in Stock Prep. he told me that Paul didn't work Saturdays and I would be required to work in the Banbury on Saturday to fill in.

Q-15. Were you ever required to work to supervise the Banbury operation when the Stock Prep. operation wasn't working on Saturday?

[143]

A., Yes sir.

Q-16. How often would you say that was?

A., Well, I really don't know, we'd get in spurts and we'd go a few Saturdays we'd work and some we wouldn't. I just don't know how many Saturdays, I didn't count them.

Q-17. Wasn't it usually though when Banbury worked Stock Prep. worked too?

MR. BENNETT CLARK: Object, leading question.

Q-18. Did Stock Prep. usually work when Banbury worked?

MR. JAMES A. CRUMLIN: Why not ask him to explain working conditions?

Q-19. When Mr. Saylor assigned you to work to cover for Paul Cummins on Saturday, did you have any objection to this? Did you voice any objection?

A., Well, I asked him if that would be all the time and he said, well, I'll give you an answer later on and the answer never did come because he was moved out to Lexington a little later on.

Q-20. But you continued to work after he had left?

A., Yes sir.

Q-21. And Mr. Haddock became the Plant Manager?

[144]

A., Yes sir.

Q-22. Did you ever complain to Mr. Haddock?

A., No sir.

Q-23. Was much of your time on Saturday spent actually working in the Banbury Department?

A., It was when Banbury was the only one scheduled, I stayed in the Banbury. But when I — when the plant and Banbury worked then I split it up. I spent more time in Stock Prep. but I'd have to go back and forth between the Departments. See, there was a wall between us.

Q-24. What did you do in the Banbury Department?

A., Well, he had their work scheduled out and I just went over there to make sure they were working and there wasn't nothing down, any machinery broken down or anything like that.

Q-25. So what would you estimate was the amount of time you spent on an average Saturday?

A., Well, I'd try to split it up. I don't think it would be half (1/2) but it would be pretty close to it between each department.

Q-26. You said you never did complain about Paul not working on Saturday?

A., Well, no, I didn't complain about working on Saturday, I just complained why I had to work [145] all of them to Mr. Hunt. I talked to him. Him and I had a conversation or two (2) about it, yes.

Q-27. Was this just in regard to Saturdays?

A., Saturdays when, just when my Department wasn't running. Because if you've got the dates there, I worked quite a few Saturdays when I didn't get off there because either Banbury was working or Stock Prep. was working.

Q-28. Did Paul ever volunteer to work for you on other days besides Saturday, overtime?

A., Well, now when we were in vacation schedule he came over and said, I'll help you out when you need me. So when I needed him I went over and asked him.

Q-29. And did he work for you?

A., Yes sir.

Q-30. Did you ever volunteer to work for Paul on Saturdays?

A., No, I told him what Conley said, that I was scheduled to work for him. But as far as me going over and saying Paul I'll work these Saturdays, no.

Q-31. Do you have any knowledge that Paul was assigned to relieve you when you needed relief?

A., No, the memo just read substitute. The memo put out on it and vacation seasons were going on and the [146] hours we were working and it said Paul would be a substitute but he worked mostly for me because I was the one asked him.

Q-32. Was Paul ever assigned to work for you, to substitute?

A., Not directly, no, as far as I know.

Q-33. Now, what, if you know, was the purpose of the memo? Was that assigning him or was that just —

A., Well, it said substitute, that meant for anybody that — me or the third shift Supervisor, which was Mr. Fain, or Charlie Owens or ever where someone needed.

Q-34. Well, did the memo say whether you were supposed to contact Mr. Cummins or whether he was supposed to contact you, or how was it supposed to work, if you know?

A., That I don't know, I just remember it said just substitute for Stock Prep.

MR. THOMAS L. HOGAN: I have no further questions.

INTERROGATION BY MR. BENNETT CLARK.

Q-1. Mr. Webb, do you remember that on one (1) or more occasions that I talked with you about this case?

A., Yes sir.

[147]

Q-2. And do you remember that I asked you if Mr. Cummins had ever offered to fill in for you during the Summer of 1971 and do you remember telling me that on one (1) occasion that you had to practically plead with him to relieve you because —

A., Well I told you that, but his wife had the car, but he did work for me. He didn't have no way of getting home but he did work for me. So, if she came and got him, I don't know. That was the only time, that one (1) time.

Q-3. Did he work for you on any other occasion than that?

A., Yes, I asked him and Paul worked for me.

Q-4. On what, one (1) other occasion?

A., No, Mr. Owens was on vacation and Mr. Fain got sick and if I'm not mistaken I think he worked, I just don't know the number of days, but three (3) or four (4) days because I was going in and putting in about thirteen (13) or fourteen (14) hours a day and then he would come over and relieve me after he left the Banbury. I don't know exactly how many days because I don't have a record of them.

Q-5. I believe that you stated you regularly covered, [148] if that's the right word, or filled in for Mr. Cummins in the Banbury on Saturdays whenever work was scheduled in the Banbury?

A., Yes sir.

Q-6. Did you receive any more pay for doing that?

A., No sir.

Q-7. During the Summer of 1971, let's take the period June to the last of July, do you know how many hours you averaged during the week during that period?

A., No sir, I don't. I just —

Q-8. To the best of your memory what did you average during July?

A., Well, who was on vacation at the time? Maybe I could have a more — was that when Charlie Owens was on vacation? That was the week that I worked the most, that's when Mr. Fain got sick and —

Q-9. How many hours did you work that week?

A., Well, I went in about 1:30 in the morning and I was working to about 3:30 or 4:00 in the afternoon then Paul would come over and take over then and I'd go home.

Q-10. There were only two (2) supervisors between the Stock Prep. and the Banbury?

A., There was only one (1), it was me at one time.

[149]

Q-11. Between the Banbury and the Stock Prep. there was only two (2) Foremen?

A., Yes sir.

Q-12. Now then, when Mr. Owens was in the plant or when Mr. Fain was in the plant during that Summer do you know how many hours a week you were averaging?

A., We was putting in forty (40) hours a week when all three (3) was there, except for Saturday which would make it, you know —

Q-13. You were putting in how many hours on Saturday?

A., Eight (8) hours.

Q-14. You were working at least forty-eight (48) hours a week then?

A., Right.

Q-15. You stated that you did or did not volunteer for Mr. Cummins?

A., No, I didn't. Mr. Saylor did and I told Paul that I'd be working on Saturday for him.

Q-16. You were assigned to work for him?

A., Right.

Q-17. Do you know whether or not the Parker Seal Company in Berea has any rule as to whether or not Foremen are required to come in with the

hourly employees on their shift whenever that shift is working?

[150]

A., If it's a three (3) shift operation, you don't. If it's a two (2) shift operation we come in with our employees if we work. I think a memo was put out to that effect after Mr. Haddock took over also to remind us of it, I'm not real sure.

Q-18. To remind you of what, that you were required to come in with your men?

A., Right.

Q-19. Whenever they were on the job?

A., Right.

Q-20. You were required to come in?

A., Right. Now, on the three (3) shift operation, no. This is just a two (2) shift operation.

Q-21. During the Spring of 1971 did the Banbury work two (2) or three (3) shifts?

A., We had a three (3) shift going there for sometime but now I don't know exactly when it was and then we went down to two (2). I just don't know the dates.

Q-22. Are you a member of any church?

A., Yes sir, I'm a Baptist.

Q-23. What day does that church celebrate as its Sabbath?

A., Sunday.

[151]

MR. THOMAS L. HOGAN: I'll object to this. I let this happen with the last person but I really don't see what —

MR. JAMES A. CRUMLIN: Didn't you bring this up?

MR. THOMAS L. HOGAN: I din't bring up what —

MR. JAMES A. CRUMLIN: You asked him what his religion was.

MR. THOMAS L. HOGAN: No, not exactly. No, he asked the other witness but I really don't know —

MR. JAMES A. CRUMLIN: Are you repeating the question? I know somebody has asked it before.

MR. THOMAS L. HOGAN: No, he asked the other witness.

MR. JAMES A. CRUMLIN: Well, we don't need to go into it anymore since he's already testified he's a Baptist and —

[152]

MR. BENNETT CLARK: No, not this particular witness, that was the last witness, Mr. Fain.

MR. THOMAS L. HOGAN: I've let it slip by on Fain but I'm objecting to this on the grounds that his religion really has nothing to do with this case or this complaint.

MR. BENNETT CLARK: Your Honor, I submit that it has a great deal to do with it.

MR. JAMES A. CRUMLIN: You're charging here discrimination because of religion and he's trying to show that they did not discriminate because of religion.

MR. THOMAS L. HOGAN: Well, that's what he's trying to do but these men are of two (2) different religions so I don't really see where that would be relevant at all.

MR. JAMES A. CRUMLIN: Well, go ahead and ask him. I don't think there's any problem here.

[153]

MR. VERNON JOHNSON: We didn't know what this man's religion was until he was asked. When you say that they are of two (2) different religions, it wasn't known until the question was

asked of the witness what his religion was, we didn't know but what they might have been of the same religion.

MR. JAMES A. CRUMLIN: Alright, go ahead.

Q-24. And what day does your church have its services?

A., Sunday.

Q-25. They don't have them on Saturday?

A., No sir.

Q-26. Have you ever been required to work on Sunday by the Parker Seal Company?

A., Yes sir.

Q-27. Have you ever missed any church services because of your work requirements?

A., Yes sir.

Q-28. When the Company required you to work on Sunday?

A., Yes sir.

MR. BENNETT CLARK: I have no further questions.

[154]

INTERROGATION BY MR. JAMES A. CRUMLIN.

Q-1. Is this against your religion?

A., Yes sir, but I worked it, when they said work, I worked.

MR. JAMES A. CRUMLIN: Any other questions?

MR. THOMAS L. HOGAN: I just have one (1) final question.

INTERROGATION BY MR. THOMAS L. HOGAN.

Q-1. You stated that it is the Company policy that the Supervisors come in with their men?

A., On a two (2) shift operation, not a three (3).

Q-2. Normally I would think that the men would be scheduled to work the same shift, the 7:00 to 3:00, 3:00 to 11:00, whatever it is?

A., No sir, on a two (2) shift operation right now we've got — in our plant we've got screen sort and final working ten (10) hours a day. Their supervisor comes in with them of a morning at 5:00 o'clock. The second shift Supervisor comes in and works till 2:00 o'clock.

Q-3. Well, if you know, is this practice followed in the Banbury too?

[155]

WITNESS: Pardon me, sir?

MR. THOMAS L. HOGAN: Is this practice followed in the Banbury Department? Of the Supervisor —

A., Well, as far as I know. I mean, I've never worked in the Banbury other than just filling in, see. But as far as I know when you have a two (2) shift operation.

MR. THOMAS L. HOGAN: I have no further questions.

MR. JAMES A. CRUMLIN: Anybody else? You may be excused, Mr. Webb, thank you so much.

* * * * *

MR. BENNETT CLARK: The charging party has questioned whether or not — you said you might not call two (2) of your witnesses, am I correct in that?

MR. THOMAS L. HOGAN: Well, I think a lot of the testimony will be [156] redundant and since the time is getting late we'll not call the whole list and we'll just have one (1) more witness.

MR. BENNETT CLARK: We would like to have just one (1) witness, if you would call Mr. Abrams to the stand. I think you should call him since he's been subpoenaed by the charging party.

MR. THOMAS L. HOGAN: We'll call Mr. Abrams, we will not call Mr. Owens.

The witness after first being duly sworn, deposed as follows:

INTERROGATION BY MR. THOMAS L. HOGAN.

Q-1. Would you please state your full name and address?

A., Bobby L. Abrams, Route 2, Berea.

Q-2. And you're employed at the Parker Seal Company?

A., Yes sir.

Q-3. How long have you been employed there?

A., Approximately seventeen (17) years.

Q-4. And what is your position?

A., Supervisor in the Banbury Department.

[157]

Q-5. How long have you held that position?

A., Oh, it's about six (6) months.

Q-6. And who did you replace?

A., Paul Cummins.

Q-7. Do you have any knowledge as to why Paul Cummins was terminated from Parker Seal Company?

A., Well, I asked him the day he left, Mr. Haddock the Plant Manager called me and told me to come in that Paul was leaving the Company and I asked Paul why and he said that it was because he wouldn't work Saturdays.

Q-8. Did Mr. Haddock or Mr. Cummins give you any other reasons besides that?

A., I never discussed it with Mr. Haddock.

Q-9. Did you after that time?

A., No.

Q-10. In the last six (6) months?

A., Well, maybe — now, Ken Hunt came around, oh, about two (2) months after Paul had left and said that wasn't the reason that he left, he said that he wouldn't work scheduled hours was the reason. That's what Mr. Hunt told me but Paul had been gone about two (2) months.

Q-11. Do you know what he meant by that, that he wouldn't work scheduled hours?

[158]

A., I didn't discuss it any —

MR. JAMES A. CRUMLIN: Sir, just a moment. I don't think this is necessary.

Q-12. What shift do you work, what hours?

A., The day shift, 7:00 to 3:00.

Q-13. Do you work on Saturdays?

A., Yes sir.

Q-14. Do you work every Saturday the Banbury works?

A., When it's scheduled, yes sir.

Q-15. Do you know if there's a foreman for Banbury on the second shift when there is a second shift?

A., Yes sir, the Stock Prep. Foreman covers it on the second.

Q-16. But there's no separate Supervisor?

A., No sir.

Q-17. Do you prepare the schedules for all the Banbury operation?

A., Yes sir.

Q-18. Do you come in on the shift with your men, are you there the full time that they're there?

A., Yes sir.

Q-19. Sometimes, Mr. Abrams, do you come in earlier than 7:00 o'clock?

[159]

A., When we're scheduled ten (10) hours I come in early.

Q-20. Now, is this the usual practice in the Banbury operation?

A., Well, it has been in every department I've been in, when the people work the Supervisor has to come in with them.

Q-21. Do you know that this has always been the practice in the Banbury operation?

A., Well, I don't know that it's always been because I haven't been closely connected with it when I've been in other departments.

Q-22. Were you told this when you went into the Banbury operation?

A., No, that — in the departments I'd been in that was always the understanding, when the shift came in early the Supervisor was expected to come in with them.

Q-23. Do you have any knowledge if Paul did this, came in early with his men?

A., I don't know. For the past few years I've been in other departments at the other end of the building and actually I didn't know whether Paul was there or not.

Q-24. Well, did you know much about the Banbury operation [160] before you became Supervisor?

A., I'd been over there about three (3) years ago on the second shift when Paul was on days, I was there about two (2) or three (3) months, I guess, on the second.

MR. THOMAS L. HOGAN: I have no further questions.

INTERROGATION BY MR. BENNETT CLARK.

Q-1. Mr. Abrams, approximately how many hours a day do you spend actively supervising your men, that is, not scheduling but supervising your men?

WITNESS: Out of the eight (8) hour shift?

MR. BENNETT CLARK: Yes sir.

A., I would say seven (7).

Q-2. Seven (7) hours?

A., Yes.

Q-3. And how many hours do you spend scheduling?

A., Well, I'd say maybe one (1) hour a day or something like that.

Q-4. Do you know if there are any departments, any other [161] departments in the Parker Seal Company at Berea where foremen in different departments are capable of covering for another department? That is, I think you have a Screen Sort Department and a Final Inspection or —

A., Yes.

Q-5. Do you have any departments like that?

A., Yes sir, Screen Sort and Final, I was there before I moved to Banbury and I was in charge of both departments on the second shift. But then on the day shift they had two (2) individual Foremen.

Q-6. Do you know whether or not at anytime that the day shifts in any of those departments would have to come in earlier than their regularly scheduled time, that is work overtime?

A., Yes sir, sometimes if we had to work ten (10) hours we would come in at 5:00.

Q-7. And do you know whether or not in those instances where the departments had to come in early if the Foremen would come in early with the people assigned to their shift?

A., Yes, the Foremen came in.

MR. BENNETT CLARK: I have no further questions.

[162]

INTERROGATION BY MR. THOMAS L. HOGAN.

Q-1. Just one (1) further question. Do you know if the methods in the operation of the Banbury Department are the same now as it was when Paul Cummins was Supervisor?

A., Well, there may have been a few minor changes since Paul left but not very much different. I would say its pratically the same.

Q-2. You're doing pretty much what he did then?

A., Yes sir.

MR. THOMAS L. HOGAN: I have no further questions.

MR. JAMES A. CRUMLIN: Mr. Anhouse.

INTERROGATION BY MR. FRED ANHOUSE.

Q-1. How many Saturdays have you had to work in the last six (6) months since you've taken over the Banbury Department?

A., Well, I don't know exactly but —

Q-2. Approximately, if you can?

A., Approximately half (1/2) the Saturdays I would guess.

[163]

Q-3. You're talking about twelve (12) or thirteen (13)?

A., Yes, something like that.

MR. JAMES A. CRUMLIN: Any other questions?

INTERROGATION BY MRS. BELLE SMITH.

Q-1. How many men are under you?

A., Seven (7)

MR. JAMES A. CRUMLIN: Any other questions?

MR. BENNETT CLARK: No sir.

MR. JAMES A. CRUMLIN: Thank you so much, Mr. Abrams. Would you call your next witness, please?

* * * * *

MR. JAMES A. CRUMLIN: Show on the record that we're waiving the order and that Mr. Haddock, when he arrives, will be the complainant's last witness.

[164]

MR. BENNETT CLARK: Your Honor, the man that we're calling is also in management. We aren't really taking him out of order. As a matter of fact, the man we're calling is higher in management than Mr. Haddock is.

MR. JAMES A. CRUMLIN: Well, he hasn't finished his case. And, therefore, since he hasn't finished his case —

MR. BENNETT CLARK: Oh, he was going to call him as his witness?

MR. JAMES A. CRUMLIN: That's right. So now we're waiving that and we're suspending that to give you a chance to proceed and start with your witness.

(It was agreed by the attorneys for both complainant and respondent that the record would show the testimony of Mr. L. G. Haddock before that of Mr. Roy Kuhn.)

The witness after first being duly sworn, deposed as follows:

[165]

INTERROGATION BY MR. THOMAS L. HOGAN.

Q-1. Would you state your name and address and your occupation, please?

A., L. G. Haddock, age fifty-six (56), I was a Plant Manager, I am now a member of the Division Staff of Parker Seal.

Q-2. And you were Plant Manager in Berea?

A., Yes sir.

Q-3. How long were you there?

A., A year and two (2) months, two (2) or three (3) months.

Q-4. What were the dates?

A., November, 70 until February, 72.

Q-5. And where were you employed before that, before November, 1970?

A., At the Third Street plant of Parker Seal in Lexington.

Q-6. And then you were transferred to Berea?

A., Yes sir.

Q-7. Was there any particular reason for that?

A., Well, our economic position, I would say, and the need, they felt the need — they might have also felt the need of some strong effort down in

Berea to try to help them get straightened out.

Q-8. Were they having problems in the Berea plant?

[166]

A., Well, there were economic problems and supervisory and we had to get them straightened out or we were on our way to being — folding it up.

Q-9. You said you were brought in then to —

A., I was brought down from Lexington. I had been Plant Manager up there for four (4) years.

Q-10. And when did you become aware of Mr. Cummins' religion?

A., Not until the Summer of 71 when we were having our vacation period.

Q-11. Did you work many Saturdays between November of 70 and the Summer of 71?

A., About half (1/2). We usually run about half (1/2) of them. Say two (2) a month, something like that.

Q-12. And did you know Mr. Cummins was not working?

A., I found out later, I can't say just when it was. It was down into the year. We had a meeting — I can tell you the incidence, we had a meeting on Saturday morning, I think it was. And we were

talking about possibly having to work Saturdays in the future because of the work load. And at that time someone, one of the Supervisors, mentioned that they would all be there except Paul. I said, well, what do you mean. And he said, well, Paul doesn't [167] work Saturdays. And that was my first knowledge. But as of when that date was, I do not know.

Q-13. Was it the Summer of 71?

A., Spring or Summer.

Q-14. Did you work Saturdays between November and that time?

A., Oh, yes.

Q-15. And you weren't aware that Paul wasn't working?

A., No, I was not.

Q-16. So you found out then in the Summer of 71 that Paul wasn't working because of his religion?

A., I found out he was not working first, then I found out later why.

Q-17. How did you find out why?

A., I asked how come.

Q-18. And he told you because of his religion?

A., No, he did not tell me, one of the other fellows did.

Q-19. When did you talk to Paul about it the first time?

A., The first time I talked to Paul about not working Saturdays and his religion was, it must have been July, August when we were having a heavy vacation schedule in the Stock Prep. Department. Because at that time it did become a problem.

[168]

Q-20. Was there any problem with the efficiency with the Banbury operation between November of 70 and the Summer of 71?

A., The efficiencies were not what we wanted, no. In fact, they were not when I went down there. That was one (1) department I had heard about before I went there.

Q-21. Was the efficiency low on Saturdays in Banbury?

A., It was on, I would say, compared to what we would have liked to have had it, it was low on both shifts on all six (6) days a week when we worked six (6).

Q-22. Did you ever personally work in the Banbury or supervise the Banbury on Saturday?

A., No, I did not.

Q-23. Did you go in the department?

A., Certainly.

Q-24. And you weren't aware that Paul wasn't working?

A., Not until later, no.

Q-25. Why was Paul Cummins fired from the Parker Seal Company?

A., Basically because he could not work Saturdays but it goes further than that, it was a fact that he was not co-operating with the fellows down in the Stock Prep. Department.

[169]

Q-26. But basically it was because he wouldn't work Saturday?

A., This was the base of the problem, yes. The problem was that he could not work with the other Supervisors, or would not.

Q-27. What do you mean, work with the other Supervisors?

A., In the Stock Prep. Department which is adjacent to the Banbury, we had three (3) Supervisors, one (1) on each shift. During July and August of 71 we had a vacation schedule in which, during four (4) straight weeks, at least one (1) of those fellows was on vacation and during that time the other two (2) guys were covering twelve (12) hours a day and we were working six (6) days a week then. They were covering twelve (12) hours a

day, six (6) days a week, or seventy-two (72) hours each. And Paul at that time was working eight (8) hours a day, five (5) days a week. And I had complaints.

Q-28. With the exception of Saturday did Paul ever refuse to work any other hours or any other days?

A., Back in — it was in the early part of the year, Banbury was working ten (10) hours a day per shift. That meant the first shift came in at 5:00 o'clock in the morning. And Paul would not come in at 5:00 o'clock in the morning. He felt — looking [170] back I feel he felt his job was more scheduling than it was supervising the people because he refused to come in at 5:00 o'clock in the morning when his shift came in.

Q-29. Was that the normal procedure?

A., It is, it still is.

Q-30. I presume this is normal procedure for the Banbury man not to come in?

WITNESS: For the Banbury Supervisor not to come in?

MR. THOMAS L. HOGAN: Not to come in at 5:00 o'clock?

A., No, it was not. Every department, whenever their people were working they were expected to be there.

Q-31. And Paul refused to come in?

A., He did not come in. He did not outright refuse. I asked him to. I do not believe in giving orders to Supervisors, I suggest to them and expect them to work it out themselves. I feel by the time a man's gotten to be a Supervisor he should be man enough to even take care of his own department.

Q-32. Did you ever ask Paul to work on Saturdays?

A., No sir.

[171]

Q-33. But you fired him for not working on Saturdays?

A., I asked him, I think it was two (2) weeks before he left, I asked him if there was any — I knew he had adopted this religion a year and a half or two (2) years ago or so, and I did ask him if there was any possibility of his being able to change his ideas or anything like that and he told me then that he was firmly fixed with his religion.

Q-34. Is that when you decided to fire him?

A., It was after that.

MR. THOMAS L. HOGAN: I have an affidavit.

WITNESS: I have a copy of it — his affidavit?

MR. THOMAS L. HOGAN: This is your affidavit.

WITNESS: Yes.

MR. THOMAS L. HOGAN: If there's no objection, this will be Complainant's Exhibit Number III.

[172]

Q-35. In the fourth paragraph, the last sentence, and I quote; "I informed Mr. Cummins that neither I personally nor the Parker Seal Company had any objection whatsoever to his honoring his Sabbath Day and he would not be required to report to work at anytime on that day so long as he continued to honor it as the Sabbath."

MR. BENNETT CLARK: Your Honor, I object unless he sets the time period when that statement was made.

MR. THOMAS L. HOGAN: It says the early Summer of 71 in the affidavit.

WITNESS: We are not talking about, say the end of August.

Q-36. The affidavit says the early Summer of 1971. Now, didn't you just say the main reason Paul was fired was because of his religion and because he —

A., No, not because of religion, because he would not work Saturdays.

MR. BENNETT CLARK: I object to the way he worded —

[173]

WITNESS CONTINUES: His religion doesn't bother me, didn't bother me at that time, one way or the other. The fact that he could not work Saturday did. We run a plant that operates six (6) days a week a good percentage of the time. Paul, in a responsible position, running a department, had to be there if that department was to function the way it should.

Q-37. Well, this affidavit states here and in another place that you didn't make a demand on him to work on the Sabbath, that you told him he didn't have to work on the Sabbath, and Mr. Kuhn has testified and now you've testified that the reason he was fired was because he wouldn't work on his Sabbath. Now, what I'm asking you is which of the statements is true, the one in the affidavit or the one you've made here today?

MR. BENNETT CLARK: Your Honor, I object because they're different periods of times, a change took place here obviously.

[174]

MR. THOMAS L. HOGAN: On the second page of the affidavit at the end of the first paragraph, "I would like to reiterate that Mr. Cummins was never asked and no demand was ever

made upon Mr. Cummins that he work during his Sabbath", Now, I don't think that sentence leaves any leeway for the time period. I think never and no demand are pretty —

MR. JAMES A. CRUMLIN: Now, let's not argue back and forth with each other. We have seen the affidavit, we can read it and we hear what witness is saying.

Q-38. When you terminated Mr. Cummins you gave him this Change of Status Notice which has already been introduced into the record?

A., Yes.

Q-39. And I think the notation on there — would you please read that, the reason?

A., Unable to work all days scheduled for work. That is my work writing.

Q-40. And that was in reference to his failure to work on Saturday?

A., And his failure to work ten (10) hour days when [175] his department was scheduled ten (10) hour days.

Q-41. I think that when the complaint was filed and I called you and asked you why Mr. Cummins was fired the only reason that you gave me was because he wouldn't work on Saturday, is that true?

A., I have heard you say that that is true, I cannot recall exactly what I did say it was.

Q-42. Isn't that what this Change of Status Notice says? It doesn't say anything about extra hours on the shift. It says all days. It either means what it says or it doesn't. I think you said earlier —

A., And you do not count the ten (10) hour days during the week as days of work?

Q-43. Well you don't say hours, you say days, but I won't debate that point with you. But I think you said earlier —

MR. JAMES A. CRUMLIN: Mr. Hogan, excuse me for interrupting. Ask the specific question and not the individual pleadings.

MR. THOMAS L. HOGAN: Mr. Crumlin, if you please, I think this is one [176] of the problems in this case, is the fact that Mr. Haddock's story is somewhat changed. I'm just trying to find out exactly what the story is today. I think the Commission has —

MR. JAMES A. CRUMLIN: Then ask him specific questions that will point that out.

Q-44. You said earlier that Mr. Cummins, it was in the early part of the year, refused to come in early, two (2) hours early on the Banbury shift?

A., When his group was scheduled, yes.

Q-45. Why was he not terminated at that time?

A., Because that was the first instance I had run into where I had any doubts about him. And if I were to terminate a Supervisor everytime I had my first doubt about him, I would have a poor time keeping Supervisors.

Q-46. How would you rate Mr. Cummins as a Supervisor as far as the efficiency?

A., I would rate him — well, compared to the three (3) fellows you have talked to today, I would rate him about mid-medium with those three (3). He had possibilities of being better than he was and I [177] have seen worse.

Q-47. What would you say his weaknesses were?

A., Lack of co-operation with the other Supervisors was his worst one.

Q-48. Did this involve the scheduling of the shift they work?

A., No, this involves the williness — oftentimes when the Supervisor is sick or he has sickness in the family or something like that, I wouldn't even know about it until I heard that so and so is out and somebody else is filling in for him, four (4) hours apiece. And the only time that I know of that Paul volunteered and that was sort of a forced volunteer was when, during that four (4) week period when the two (2) guys were covering twelve (12) and twelve (12), Chester Webb got after him and told him that Oscar was sick. Oscar was one (1)

of the two (2) guys working a twelve (12) hour shift. Chester got after Paul and told him that Oscar was out sick, he could not cover, he had to have some help.

Q-49. Did you ever assign Paul to work a shift during the week which he refused to work?

WITNESS: What was that again?

[178]

MR. THOMAS L. HOGAN: Did you ever assign Paul to work a shift or to substitute for somebody that he refused to?

A., I talked to Paul about — the big problem, as I saw it, was I could have just told Paul, yes, on Tuesdays and Thursdays you go down and relieve whoever was on the afternoon shift for four (4) hours so that they have a chance to go home, get their dinner and relax a bit. The big problem was the fact the way these fellows felt about Paul, he had to go down and volunteer to do it or we gained nothing except the fact that maybe the guy would get four (4) hours rest.

Q-50. Perhaps you could explain that, I don't understand, you had assigned the other people to work the shift why was Paul —

WITNESS: What do you mean I had assigned these other people to work the shift?

MR. THOMAS L. HOGAN: Well, I assumed that when the people were on vacation and the people had to work the twelve (12) hour shift somebody had to tell them they [179] had to work twelve (12) hours.

A., Yes, we put out a weekly notice.

Q-51. But Paul was not assigned to work a twelve (12) hour shift?

A., Paul was marked down at the bottom of that department as a substitute. And that was after I had talked to Paul about what I expected him to substitute as.

Q-52. What I'm saying is that you gave somebody else a list that said you work 7:00 to 7:00 on Tuesday, Paul was still working a 7:00 to 3:00 shift. Now the other two (2) men were working twelve (12) hour shifts, why wasn't Paul assigned a twelve (12) hour shift? That would have relieved the other men.

A., I thought I had covered that. We have trouble understanding one another, I can see that. I had talked with Paul at the start of this four (4) week period and told him that if he was to be able to work with these three (3) fellows down in Stock Prep., he was going to have to go down and volunteer to take over a four (4) hour period for them in the evening. My assigning him would have given them a four (4) hour rest during the [180] day,

one (1) day a week or two (2) days a week but it would not have helped his position with the other three (3) Supervisors.

Q-53. There's a problem, I can understand, but I don't understand what deep problem Paul had that he had to volunteer to another Supervisor to work?

A., Well, when I get complaints from two (2) out of three (3) Supervisors of a department because they are working seventy (70) hours a week and Paul is only working forty (40) hours a week, then I had a problem between Supervisors. In a group of seventeen (17) Supervisors, who I was trying to weld into a group, a team, you can't do that if one (1) of them is going to be a loner.

Q-54. Mr. Haddock, you were assigning the shifts to them, weren't you?

A., Do you want to see a copy of —

MR. BENNETT CLARK: I object, we have gone over and over and over this, I think —

WITNESS: If you were to read a copy of the notice would that help?

[181]

MR. THOMAS L. HOGAN: No, but I — either I'm just not understanding you or —

MR. JAMES A. CRUMLIN: Gentlemen, gentlemen, as I understand the question simply is, were you responsible for assigning Supervisors to various hours that they worked?

A., Yes sir.

MR. JAMES A. CRUMLIN: Does that answer your question?

MR. THOMAS L. HOGAN: The Commission understands it but I still can't — If the problem was the other Supervisors didn't like the fact that Paul wasn't scheduled for work why Paul would have to go and volunteer to do the work?

MR. JAMES A. CRUMLIN: Well now, I think this is a statement maybe for you to make in the argument but to argue with this witness, I don't see the validity.

[182]

MR. BENNETT CLARK: Your Honor, may we join with that objection as Counsel for the Respondent?

MR. JAMES A. CRUMLIN: You don't have to, you've already made your objection.

Q-55. Did Mr. Fain ever come and complain to you?

A., Yes sir.

Q-56. What was his complaint?

A., Well, his — Oscar had a dual problem, at the start of the year Oscar had been what we call a non-exempt employee, he does draw overtime. But sometime in the Spring of that year I changed Oscar from a non-exempt employee to an exempt employee, which is a higher rate, which is a higher base pay but they do not draw overtime. And then about a little while after that we get into this heavy overtime period and Oscar was a little put out by the fact that he was not drawing overtime. But his big gripe, as I listened to him, he came up to my office and unloaded on me one day, his big gripe seemed to be the fact that they were working seventy (70) hours a week and he knew Paul was making more than he was and he was working forty (40) hours a week.

[183]

Q-57. Did he think that Paul should be working more hours?

A., Yes sir.

Q-58. Was he aware that Paul was scheduled as a substitute for him?

A., Yes sir, it was posted on the board and everybody got a copy of it.

Q-59. Was he supposed to contact Paul to substitute for him?

A., No, I had asked Paul to contact them. I did not tell them to contact Paul.

Q-60. Did Mr. Fain say that Paul ever had?

A., No, he did not.

Q-61. He didn't say that he had any conversation with Paul?

A., No. He might have and just not brought it up. He did not say anything to me about it.

Q-62. Is there a necessity for a Supervisor on the second shift in Banbury?

A., Well, we proved in January, I believe it was, we had a Management Trainee brought into the plant for a short time and put him on second shift Banbury. And he increased efficiencies in that department seventeen percent (17%) one month and up to twenty percent (20%) the next month. Yes, we could have used another [184] Supervisor in there but there was only five (5) people in there, it's pretty hard to justify a Supervisor for five (5) people as a standard part of your supervising group.

Q-63. Is the efficiency lower in Banbury on Saturday when there isn't a Supervisor just for Banbury?

A., I would have to look at my figures to be able to tell that. The efficiency varies so much day to day depending on what kind of work they're running, I don't know if you can take a look. We

had actually two (2) different types of operation in the Banbury, as Paul might have told you already, mixing and master batching and accelerating and it depends a lot on just what type of work they're doing just how their efficiency is. Did you have any particular Saturday you were interested in? All I have is just by date, I do not have by Saturday.

Q-64. Just if you could tell which of the Saturdays that Banbury worked?

MR. BENNETT CLARK: Your Honor, I am compelled to object because I don't really understand where this is leading.

[185]

MR. JAMES A. CRUMLIN: Mr. Clark, I think what we have here, this is my personal opinion of it, I can get the opinion of the Commission members here if you want it, but it seems to me that we are hammering on a lot that is not really germane to what we're trying to decide.

MR. BENNETT CLARK: Your Honor, that's my point.

MR. JAMES A. CRUMLIN: Now, just a moment — now, we think that Mr. Haddock or perhaps Mr. Khun, they're both here, they are authorities at the plant, they ought to tell us without any other superficiality about it whether or

not they have discharged this man because of his religion or to tell us whether or not in discharging him they made every effort to work out their schedule at the plant to convenience him. And we think they this obligation. As we look at the statute and read other decisions we are of the opinion that the employer has an obligation to work [186] out some kind of relationship wherein he may be permitted to continue working and keep his religion. Now, if it can't be done then we'll hear now on this floor an explanation as to why it could not have been done. We want to know why he was not required to work some other hours during the week and someone else assigned to his position. We think that a complaint from one (1) or two (2) other employees that they have to work seventy (70) hours and he works forty (40) was a matter of lack of efficiency, perhaps not on Paul but whoever was responsible for assigning Supervisors. It looks like to me we ought to have some explanation as to why the other Supervisors were not assigned who didn't have this religious belief and if any effort at all was made to accommodate him in his religious beliefs. Now, this is what we're trying to ascertain here and if you have any proof to this effect I think it would help us all because thus far we can't quite understand yet why something wasn't done. We think maybe Paul was at fault too by not taking this [187] matter — control of it as they should have and worked it out. To say

that they're demanding today. I don't know how the Commission is going to feel about this. But somehow or another we ought to get to the crux of what we're talking about.

MR. BENNETT CLARK: Your Honor, if I may simply ask a question, but I'll be glad to wait if you want to go ahead, sir.

MR. JAMES A. CRUMLIN: You may ask your question.

MR. BENNETT CLARK: Alright. If I understand what you're saying, Your Honor — it's a question I want to ask of you.

MR. JAMES A. CRUMLIN: Alright.

MR. BENNETT CLARK: It's my understanding that you are stating that it is the Commission's interpretation [188] of the Kentucky Civil Rights Law that the employer is under an obligation to accommodate Mr. Cummins' religion by modifying its work schedules and its business if it can do so without undue hardship?

MR. JAMES A. CRUMLIN: Yes, if not then they ought to tell us what hardship it would work on the Company to do so and what efforts were made to work it out.

MR. BENNETT CLARK: In other words, Your Honor is saying that the Kentucky Commission of Human Rights will apply to this case the guideline

of the July 10, 1967, which is the Equal Employment Opportunity Commission?

MR. JAMES A. CRUMLIN: I don't want to speak for the whole Commission at this point until we have gone into conference on it. But we do feel that somewhere down the line we ought to have this kind of an explanation given to us. And we're hoping that we can do a fair and impartial job and we want to do that but we feel that somewhere you ought to give us some kind of something to put our teeth into.

[189]

INTERROGATION BY MR. FRED ANHOUSE.

Q-1. I just wanted to ask Mr. Haddock a question. If Mr. Cummins had worked on Saturday would he still be with the Company?

A., It would depend on how he was getting along with the other Supervisors. Well, what answer do you — I'd be glad to give you the answer if I could understand what the complaint is.

Q-2. Well, what I'm saying is this, it seems to me the whole dispute seems to be on Saturday, it seems to be the big dispute?

A., Saturday was the base root of the thing, yes.

Q-3. What I'm saying is this, if the man had not changed his religion, if the man had gone on as he had done the years before and worked on Saturday as he had done the years before, he would still be with the Company assuming everything else being equal?

A., Assuming everything else being equal, if you mean by that that —

Q-4. Well, what I mean by everything being equal means that everything else —

A., Nothing else had come up, yes.

[190]

MR. JAMES A. CRUMLIN: Do you have further questions?

MR. BENNETT CLARK: Yes, I do. I have very few.

INTERROGATION BY MR. BENNETT CLARK.

Q-1. Of the people, the men, the Foremen, required to cover for Mr. Cummins on Saturday were there certain men who would not otherwise have been required to work on Saturdays who covered for Mr. Cummins?

A., I don't believe — there were Saturdays — to have that happen Banbury would have had to have worked without the Stock Prep. Department working.

Q-2. Were there such Saturdays?

A., I don't know off hand if there were such Saturdays or not.

Q-3. Were the people who covered, if you know, Mr. Cummins, people who either practiced no religion or either practiced a religion with some other day than Saturday as their Sabbath?

A., As far as I know, yes. If they had religion it was practiced some other day than Saturday. But we do —

Q-4. Those people were selected for this job because [191] their religion was such that they didn't honor Saturday as their Sabbath?

A., They were picked because of their religion? No, I would have to disagree with you. If I understand your question.

Q-5. No, I'm not — but did not refuse to work because Saturday was not their Sabbath?

A., No.

Q-6. As far as you know?

A., No.

MR. BENNETT CLARK: That's all the questions I have.

MR. JAMES A. CRUMLIN: Do you have further questions?

INTERROGATION BY MR. THOMAS L. HOGAN.

Q-1. I think you stated this, you said the person who worked covering Banbury was normally already working and would have been assigned to work in Stock Prep.?

A., If Stock Prep. was working, he would have been working in Stock Prep., yes.

Q-2. There wasn't any need to have an additional person except for the times that Banbury —

[192]

A., Worked and Stock Prep. did not, yes.

MR. THOMAS L. HOGAN: I have no further questions.

INTERROGATION BY MR. JAMES A. CRUMLIN.

Q-1. Mr. Haddock, I do apologize to you if it seems that I'm not being a chairman, but I don't want — I would like to know from you please, sir, if we may, if you can tell us, from early Summer, and I take it that means June of 1971, up until that time the Company was very well pleased and satisfied with Mr. Cummins' employment record, were they not?

A., I would have to — with one (1) exception and that would be, it was back in the early part of

the year sometime, in the Spring, when I first found out about Paul not working, wouldn't work ten (10) hours a day when his shift was working ten (10) hours a day. Outside of that fact I would say, yes, his conduct was acceptable.

Q-2. He was drawing more money, I heard you to say, than Oscar G. Fain was drawing?

A., Yes sir.

Q-3. More than Chester Webb was drawing?

A., Yes sir.

Q-4. More than Bobby L. Abrams was drawing?

[193]

A., Yes sir.

Q-5. These are all Supervisors?

A., Well, Bobby Abrams was not in the Stock Prep. Department.

Q-6. The other two (2) men were?

A., Yes sir.

Q-7. Did you ever order Mr. Cummins to work in either of these men's place in order that they might work for him on Saturday?

A., No sir.

Q-8. Was there any particular reason why this

was not done rather than work these men seventy (70) hours and him work forty (40) hours?

A., Well, his Department, during the week his Department was running too, I couldn't pull him — I would gain nothing by pulling him out of there and putting him in Stock Prep.

Q-9. They worked the same hours during the day?

A., They worked the same hours during the day, yes sir. It's like trying to play dominos and you've only got so many places to put them.

Q-10. There was no other place in the plant that he could make up the time or the difference for his hours off on Saturday?

A., No sir, because normally, by contract our normal [194] work week is Monday through Friday. On Saturdays we go to a fixed time and a half and we only work that when we have to. On Sunday we pass the days by contract when we pay double time. So we work very few people on Sundays, a minimum.

Q-11. It wasn't often that you had this Saturday work, was it?

A., I would say that we average about two (2) Saturdays a month. It depends, some parts of the year we work four (4). Year before last we ran from Memorial Day to Labor Day and worked every Saturday.

Q-12. And there was no way that the skeleton shift that you worked on a Saturday could be handled without his presence because of his Sabbath?

A., No, Saturday if we worked his Department, it was his full Department.

Q-13. Full Department?

A., It was not a skeleton. It might be just two (2) or three (3) departments out of the whole plant but if his Department were working it was the full Department.

Q-14. And you say that there was no way that this could be worked out so that he could have this time off because of his religious beliefs?

[195]

A., I could not find any way, I tried.

Q-15. What — I don't mean to be taking over the case but this is what we're interested in hearing, what efforts did you do to try, when you say you tried?

A., The only alternative open, to have him cover when his religion would let him cover, and would be on a Sunday but we very seldom work people on Sundays because of that double time in our contract.

MR. JAMES A. CRUMLIN: Mr. Anhouse, do you want to ask him?

INTERROGATION BY MR. FRED ANHOUSE.

Q-1. Yes, you made a statement that on the second shift when you had a Supervisor there for a short time that the efficiency had increased much in that small crew that you had?

A., Yes sir.

Q-2. Why — was it possible that he could have filled in part of that time on that second shift and keep the efficiency up and make up some of the time that he was lacking? It would have given you a Supervisor on the second shift part of the time too.

[196]

MR. JAMES A. CRUMLIN: Did you understand his question?

MR. FRED ANHOUSE: Do you understand what I'm saying?

A., It's a possibility.

MR. FRED ANHOUSE: I mean, this is what

MR. JAMES A. CRUMLIN: He's answered, it's a possibility. Did you get his answer?

MR. BENNETT CLARK: Yes sir, there's a problem with this Supervisor. I think that Mr.

Anhouse hasn't — it will help if you explain who the Supervisor was and why he was there.

Q-3. I think we recall that he had come because the efficiency had slipped there and that somebody had been sent down to bring it back up, is that what you were going to say?

A., He was a Trainee, he was a Management Trainee, he was positioned up there to see what he could do with a little personal work but also it was a [197] training program for the Supervisor himself.

Q-4. Yes, but what I was thinking, due to the fact that even a Trainee going in that the efficiency had increased. At no additional cost to you this man could have been requested to put in additional time to a shift that was already in effect to keep the efficiency up?

A., Yes, the Management Trainee who was put in there for that one (1) month period or whatever it was, developed a very close personal relationship with that group of five (5) people on the second shift. If Paul had been able to maintain that close personal relationship, yes, there's a possibility he —

Q-5. I'm not saying he could work another eight (8) hours, he could have worked three (3), two (2) or four (4).

A., And if he could have maintained that personal relationship.

Q-6. You would have had that efficiency statement to compare it with?

A., Right.

MR. JAMES A. CRUMLIN: Any other questions?

[198]

DR. A. R. LASLEY: Mr. Chairman, I have.

MR. JAMES A. CRUMLIN: Yes, Dr. Lasley.

INTERROGATION BY DR. A. R. LASLEY.

Q-1. I'm a little confused on one point here and I'd like for Mr. Haddock to clarify this. Was Mr. Cummins fired because he refused to work on Saturday or because he refused to co-operate with the other Supervisors?

A., It was a combination. Basically, I would say, starting out at the beginning — yes, it had to be because he could not work Saturdays, would not work Saturdays but to compensate for that he made no effort to go down and relieve these other fellows during the week who had to relieve him on Saturdays.

MR. JAMES A. CRUMLIN: Well, if they worked simultaneous shifts how could he have done that without Management making the adjustment in time?

A., The four (4) hours — he worked his shift until 3:00 o'clock, these fellows working twelve (12) hours were working from 7:00 in the morning until [199] 7:00 at night. What I asked Paul to do was go down one (1) or two (2) evenings a week, go down from 3:00 till 7:00 in the evening, let one (1) of these fellows go home, get some extra sleep, get a shower, get some — a little extra rest. Paul would have had to stay there a twelve (12) hour day.

Q-2. Mr. Haddock, who was responsible for firing Mr. Cummins? Do you accept the sole responsibility or were other people involved?

A., That happened to be my sole responsibility, sir. I was the Plant Manager, that was my job. I was the one directing a group of Supervisors and Foremen.

INTERROGATION BY MR. VERNON JOHNSON.

Q-1. Who made the determination to let him stay on as long as he did? Now, you were Plant Manager for quite some time there before you realized that he wasn't coming in. Now, from the time you realized that he wasn't coming in on Saturdays, what was it, about a year after you became Plant Manager before you realized that?

A., No sir, November till January, two (2) months.

[200]

Q-2. Now, whose decision was it for him to stay on after that before some —

A., My decision.

MR. VERNON JOHNSON: Alright. Thank you.

MR. JAMES A. CRUMLIN: Any other questions?

INTERROGATION BY MR. BENNETT CLARK.

Q-1. Just one (1) question. Why did you change, Mr. Haddock, your decision of letting him stay on and terminated him, in part, because of this Saturday work situation?

A., Well, the original trouble I ran — the first doubt in my mind was this ten (10) hour bit, I could live with that, I felt. But when it came down to his interaction with this other group of three (3) Supervisors, the four (4) of them represented almost one quarter (1/4) of our Supervisory force, his effect on them and the way they were feeling, I had direct complaints from two (2) of them, that forced, actually forced me into a decision. I had to do something to get one quarter (1/4) of my [201] Supervisory force straightened out. I would — would it be alright if I asked a question?

MR. BENNETT CLARK: No, I don't think so. You can direct it to them but I can't answer it.

WITNESS: Mr. Commissioner, I have wondered — since, of course, I've had a lot of self doubts and everything else about this since it happened — is not an employer permitted to distinguish between the type of conduct they'd expect from an hourly employee, who is responsible only for his own actions, or for the actions of a Supervisor, who is responsible for the Department, and investment of thousands of dollars, and a group of people?

MR. THOMAS L. HOGAN: I think I'm going to object here. I think we both want to object to that question.

MR. BENNETT CLARK: I'm afraid I have to too. I don't think that we can cast that burden on the Commission.

* * * * *

[203]

EVIDENCE FOR THE RESPONDENT

The witness after first being duly sworn, deposed as follows:

INTERROGATION BY MR. BENNETT CLARK.

Q-1. Mr. Kuhn, would you please state your name and address and employment to the Commission?

A., My name is Roy Kuhn, I live at 2157 Lakeside Drive, Lexington, Kentucky. I am the General Manager of the O-ring Division.

Q-2. For what company?

A., Parker Seal Company.

Q-3. How long have you been employed by the Parker Seal Company?

A., I've been with Parker Seal for approximately a year and a half, with Parker-Hannifin for fourteen (14) years.

Q-4. What other positions in the Company have you held?

A., Well, I started as a Lab Technician and after I graduated from college I was an Engineering Technician, Project Engineer, Quality Control Manager and various other supervisory positions including

Plant Manager, Director of Quality Assurance and presently in this position.

[204]

Q-5. What were the responsibilities of your job at Parker Seal Company during the Winter and early Spring of 1970 and 1971?

A., Between October of 70 and August of 71 I was Manufacturing Manager, from August until the present time I'm Division Manager.

Q-6. Would you, just in a very brief comment, state how these responsibilities related to the Berea plant, if they in fact did?

A., Yes, I had full responsibility for everything that goes on in the Berea plant.

Q-7. Does that involve the actual operation of the producing of goods there?

A., Yes sir.

Q-8. Now, would you please state for the Commission whether or not there were any changes in the economic picture of the Berea plant in so far as the profit and production pictures were concerned for the period from mid 1969 until mid 1971?

A., Yes, the profitability of the Division, which includes the Berea operation, steadily declined between, actually I think it started declining in 68, late 68 and declined to a low ebb in 69, early 70.

[205]

Q-9. How did you gain your knowledge of these changes?

A., Through the divisional and corporate reports.

Q-10. Now, we know it had this effect in the operation of the Berea plant, let's talk about personnel changes, if any?

WITNESS: I'm not sure I understand the question.

Q-11. Was anything done to try to cause a turn around in the economic decline in the operation of the Berea plant.

WITNESS: Do you mean, did I take action?

MR. BENNETT CLARK: Or did the Company, if you know from your position in the Company, take action?

A., Yes I can only speak of the specifics from the time I was there, is that what you mean?

Q-12. Yes sir.

A., Yes, early in 70 — excuse me, in October of 70 there was a large layoff of both hourly and salaried employees. We were quite overstaffed for the output that the plant was producing.

[206]

Q-13. When you speak of salaried employees, of whom are you speaking?

A., All types of salaried employees, technicians, foremen. Most of the exempt salaried people in the Berea plant are supervisory people.

Q-14. If you know, what caused the economic problems at the Berea plant, from the experience of your experience?

A., Well, there were a number of factors. One (1) was the general economic picture in our whole economy. Another was the —

Q-15. When you say our economy, whose economy are you speaking of?

A., The United States, economy of the United States. The other factor is that the Berea plant in general had a fairly low, or it was my opinion that it a deteriorating morale factor and the output per person had dropped significantly in that period of time.

Q-16. Did you personally take part in any Company operation or any Company effort to turn around the Berea plant situation?

A., Yes.

Q-17. Would you just explain what you did?

A., Well, initially I made some personnel changes. [207] I changed the Plant Managers.

Q-18. What Plant Manager was replaced and what Plant Manager came in?

A., Mr. Saylor was acting Plant Manager at the time that I got the job and I moved him from Berea to Lexington and moved Mr. Haddock to Berea. In addition to that, I believe it was in December of 70, I spent a month in the Berea plant covering all three (3) shifts myself from approximately 8:00 o'clock until 1:00 or 2:00 in the morning.

Q-19. Pardon me. When you sent Mr. Haddock to the Berea plant to relieve Mr. Saylor did you instruct him as to what manner he was to operate the Berea plant?

A., Yes, not necessarily at that moment, but certainly there were many conversations between myself and Mr. Haddock concerning how a plant is to be operated, yes.

Q-20. Prior to, let's say, August of 1971 what instructions, generally speaking, did you give Mr. Haddock about rectifying what you believed to be a bad economic situation at the Berea plant?

A., Well, for one (1) I instructed Mr. Haddock to make the people aware, including all of our Supervisors, of the condition that we were in and that we were [208] not efficient. And to solicit and, in effect, to insist on longer hours, more personal interest, more involvement on the part of the Supervision.

Q-21. If you know, was the scheduling of Saturday work, particularly in the light of your Union Contract, was that considered a good business practice if it could be avoided?

A., No, we did not work Saturday unless our schedules demanded it because of the time and a half provisions.

Q-22. Was your Company paid any more for the products they produced on Saturday, by the customer, than the product produced on Friday?

A., No sir, there's no way of telling when the parts are made.

Q-23. So, if it was more costly to produce them on Saturday, the Company took the loss, not the customer?

A., That's true.

Q-24. Mr. Kuhn, are you familiar with an incentive program in operation at the Berea plant called the Cost Goal Program?

A., Yes sir, the Cost Goal Program is not just a Berea incentive program, it's an incentive program that's [209] corporate wide and has been in effect for as long as I can remember, as long as I've been with the Company.

Q-25. Mr. Cummins has testified that he was a member of or that he participated in the Cost Goal Program. Now, he has also testified that he was a Foreman and exempt salaried employee. To what

persons was the Cost Goal Program available or open?

A., Well the Cost Goal Program first of all is considered an honor to the degree that the only people who are offered this incentive are those people who exhibit leadership and interest in the Company's well being and who are in a position to directly effect profits.

Q-26. I believe that he became a member of the Cost Goal Program before he joined the World Wide Church of God when he would no longer work on Saturdays and certain holy days. Can you state what was required of members of this program? Once they were in it, what would be required of them?

A., Well, each individual is expected to treat the activities around him as though he were responsible. In other words, to take individual initiative, to work normally above and beyond the 8:00 to 5:00 [210] requirements of someone in a non-exempt priority capacity.

Q-27. Would there be more than one (1) Foreman at the plant who was a member of this program?

A., Yes sir, most of the exempt Foremen who have been with us for a reasonable length of time and show initiative are normally put on this program.

Q-28. If one (1) Foreman doesn't act with initiative or incentive does he personally suffer as opposed to the other members of the program? Does he lose anything on a pro-rated fashion or —

A., No, it is a group program.

Q-29. Were there any personnel or morale problems among the Foremen at the Berea plant during the Winter of 1970 and 1971?

A., Well, yes I would say there are always some morale problems with people. I would say that they were, to some degree, a little bit unsure of themselves because of the new style of management that we were trying to implement. For one thing I particularly expect my supervision to act more independently, I think, than in the past. In other words, I delegate responsibility and expect them to act with individual initiative and for the most part make decisions that previously they had been [211] instructed — where they had been instructed in the past.

Q-30. If a Foreman, an exempt Foreman, was a member of the Cost Goal Program and becomes aware of a situation where some other Foreman may need some relief, for reasons of fatigue or whatever, what was the policy developed under your leadership, if any policy was, at the Berea plant as to how that Foreman should react to that situation, that is, to relieve if he possibly could relieve the Foreman?

A., Well, in all instances we treat this thing as a team effort. We stressed teamwork in our Supervisory meetings and some of our Cost Goal meetings, that we pitch and expect to help each other out.

Q-31. Do you know whether or not any meeting was held that you attended or directed in Berea for the Foremen in the Winter of 1971, I believe it was?

A., Yes.

Q-32. Do you remember where that meeting was held?

A., Yes, at the Boone Tavern in Berea, Kentucky.

Q-33. Do you remember who attended?

A., I couldn't give you a complete list, I do remember most of the people who were there. I mean, if you gave me a name, I would give you an answer.

[212]

Q-34. Do you know whether or not Mr. Webb was there?

A., Yes, Mr. Webb was there.

Q-35. Was Charlie Owens there?

A., Yes, Mr. Owens was there.

Q-36. Was Mr. Cummins there?

A., Yes, Mr. Cummins was there.

Q-37. Was Mr. Fain there?

A., Yes.

Q-38. Was Mr. Abrams there?

A., Yes.

Q-39. Were there Foremen other than the people I've named?

A., Oh, yes. The meeting, as I recall, included — this meeting, I'm fairly certain this included all Supervision in addition to the Cost Goal candidates. So, most every one of the present Supervisors were at that meeting.

Q-40. What was the purpose of that meeting?

A., The purpose of the meeting was to better define the attitudes of myself and the new management to a degree, to explain our philosophy, to motivate, to try and allay any fears that the people had about their own jobs, to indicate to them that we were interested in performance. There had been some concern that the new management [213] was going to replace many of the old Foremen with new people and we wanted to let them know that we were interested in performance. And as long as each individual performed in accordance with his best ability that they did not have to be concerned for their jobs.

Q-41. You used the word performed, what do you mean performed, in practical terms?

A., In practical terms, to be decisive, to work hard, to show that they were interested, to put forth the extra effort that we felt was needed at that time, and still do feel is needed.

Q-42. Would working scheduled hours, or scheduled days, I'm referring to the Foremen working scheduled days, would that have anything to do with performance?

A., Oh, yes. Each Foreman is required to work whatever hours are scheduled in his Department and in addition to that there was considerable pressure, you might say, applied by myself to many of the people to motivate everyone and anyone to put additional time and effort into special projects, scrap reduction, methods improvements, clean up campaigns, whatever they could contribute to the improvement of the operation at that time.

[214]

Q-43. Were you ever actually at the Berea plant? I believe you testified you were in the Summer of 1970, 1971?

A., Oh yes, many hours.

Q-44. What was your purpose in going to the plant?

A., Well, initially, as I said, I spent over a month's period as many as sixteen (16) to eighteen (18) hours a day to try and — for one (1) reason to try and show that I was more than willing to work the same or more hours than I was expecting of the people that worked for me, and sort of set the pace, to become aware of what was going on down there, to meet all the people, to familiarize myself as much as I could with the problems of the plant.

Q-45. During that period did you work on any Saturdays?

A., Yes, I worked many Saturdays.

Q-46. Did you ever work any Sundays?

A., Yes sir.

Q-47. Did you work with any particular department in the plant, that is did you become involved with any particular department within the Berea plant?

A., Yes sir.

Q-48. Specifically, did you ever work in the Banbury Department?

[215]

A., Yes, I did.

Q-49. What was your purpose in working at

the Banbury Department and what did you do, if anything?

A., Well, one of the main reasons I got involved in detail with the Banbury Department is that there seemed to be a tremendous lack of consistency from day to day and from shift to shift regarding the efficiency and the output. Not only that, there was a significant difference between the output of the Berea Banbury and the Winchester Banbury. We have a manufacturing facility in Winchester that is almost identical to the Berea facility. And the production of the Winchester facility is almost, well, it's between forty (40) and fifty percent (50%) higher than the Berea facility.

Q-50. What specifically, if anything, did you do to try to rectify the difference?

A., I looked at the methods in the manufacturing of the rubber through the Banbury and tried to eliminate the limiting factor in each of the production steps. In other words, concentrate on the most obvious delays and eliminate those and then go on to the next.

[216]

Q-51. Was the Department improved, the efficiency improved?

A., Yes sir.

Q-52. Significantly?

A., Yes sir, specifically there seemed to be a significant improvement on the second shift. Initially the first shift was producing almost thirty (30) to fifty percent (50%) more than the second shift and we brought the second shift up almost to equalize the first shift.

Q-53. Did you ever make any effort to determine why the second shift was not initially producing up to the efficiency of the first shift?

A., Well, there were many factors. We had a problem with one of the hourly employees, I think that one of the reasons is that they were not getting enough direction. And I would say that some of the methods changes that we put in had a major bearing. Also I assigned, at one time I assigned a Management Trainee to a number of weeks in the Banbury to assist us in there.

Q-54. Is he still on the second shift in the Banbury?

A., No, he's not.

Q-55. Is there a Foreman now on the second shift in Banbury?

[217]

A., No, there's not.

Q-56. Do you know why there's not?

A., Yes, because the number of people on the Banbury and the activity there doesn't warrant or actually we cannot justify a full time Supervisor for that many people.

Q-57. That is, on that particular shift?

A., On that particular shift.

Q-58. Do you know whether or not Saturday work is now being scheduled for the Berea plant, for the Banbury Department particularly, at the Berea plant from time to time?

A., Yes, we are scheduling from time to time Saturday work.

Q-59. What determines whether or not Saturday work is scheduled in the plant?

A., The workload that is presented to the plant from our Inventory Control Department. By that I mean, we have a very short lead time in our business and when orders are —

Q-60. What's a short lead time?

A., We have to deliver in a very short period of time after we have received an order. So that when orders pick up we have to respond very quickly and the workload is calculated by our Inventory [218] and Production Control Departments and assigned to the plants by size of ring and compound.

MR. BENNETT CLARK: That's all the questions I have, Your Honor.

INTERROGATION BY MR. THOMAS L. HOGAN.

Q-1. You say that the production was off in 70, 71?

A., No, I said that the production had declined from 69 — actually 68 into the time that we came in 1970.

Q-2. What month was that in 70?

A., I arrived on the scene in October of 70.

Q-3. Until August of 71?

A., Until today.

Q-4. You're still —

A., I'm still with Parker, I was never stationed in Berea.

Q-5. Were there any major changes made in the Banbury Department, you mentioned something about methods changes?

A., I wouldn't — the word major is difficult to define. We made changes in the Banbury area, methods changes [219] with the existing equipment. For instance, we added, at one time, a table and had our material cool off on a table and attempted to speed up the process by having one batch cool while the other batch was being chopped up in our choppers.

Q-6. Well, were these changes the factors that led to the increase in efficiency of production?

A., I think they were one (1) of the factors, another factor, I think, was the mere attention that was given to all the details in the Banbury.

Q-7. Did you have any personal knowledge of Paul Cummins and how he performed in the Banbury operation?

A., Yes sir.

Q-8. What was that?

A., Well, with my exposure to Paul I felt that Paul was an interested employee and willing to co-operate.

Q-9. Was there any question about his efficiency, his competency to run the Banbury Department?

A., At the time I would say that I didn't have enough knowledge of the Banbury Department, what was required of all the Banbury Department, to say [220] that he was a good Banbury Foreman. I thought that Paul was one of the stronger Foremen that we had.

Q-10. I think you mentioned something about the difference in — I think you said lack of consistency in the efficiency between the first shift and the second shift. And you think this, as I understand it, this had to do with the fact that

there was not a Supervisor present on the second shift?

A., Partially.

Q-11. Is there now a Supervisor on the second shift?

A., No, there's not, not for the Banbury.

Q-12. And this is strictly for the economic reason there would not be enough men to justify this?

A., Well, that is the major reason. One (1) of the factors is that the efficiency has never gone back down since the time that we were there. In other words, we didn't backslide. And so it doesn't warrant having a full time Foreman for that many people in that Department.

Q-13. So it really had to do with the methods changes that improved the efficiency more so than the personnel changes?

A., No, I wouldn't say that. I would say it was partially due to the fact that we made some [221] methods changes and partially due to the fact that I spent so much time on it. I worked with the people and the Foreman that I assigned to it worked with the people, organizing their activities and indicating to them that we were interested in what they were doing. And we resolved, I think we resolved a lot of morale problems on the second shift.

Q-14. Would you be more specific about the morale problems, what they were? Are you talking about all the employees or are you talking about your Supervisors?

A., No, I was talking about the hourly employees. We didn't have a Supervisor on the second shift in the Banbury.

Q-15. Well, I'm talking about in general, you were talking about morale problems in the plant?

A., Yes sir.

Q-16. Were there morale problems among the Supervisors?

A., I would say off and on there were morale problems, yes.

Q-17. In relation to what?

A., In relation to, I would say it was more of a fear that the older employees were going to be replaced by people that I would bring in from the outside.

[222]

Q-18. Did you replace any of the Supervisors?

A., Yes, we did.

Q-19. How many were there?

A., Off hand I would say approximately three (3).

Q-20. Were they replaced by new people, have they been as of now?

A., Yes.

Q-21. All three (3) of them have?

A., Yes.

Q-22. Were there any Supervisors who weren't replaced?

A., Well, now you're asking me to answer a question that expands a time frame of sixteen (16) months. The circumstance have changed significantly over sixteen (16) months. If you'd rephrase the question I'll —

Q-23. What is the difference in the number of Supervisors you have today and which you had when you first went to the Banbury plant?

A., I couldn't tell you exactly. I would say that we probably have a few more Supervisors today than the day that I got there. We have less Supervisors than the prior time to the time that I was there, because a number of Supervisors were laid off before I got there.

Q-24. Were there any Supervisors laid off in the Winter of 70?

[223]

WITNESS: The Winter of 70. Would you tell me what months you consider Winter?

MR. THOMAS L. HOGAN: November, December.

WITNESS: Laid off?

MR. THOMAS L. HOGAN: Or fired or terminated?

A., I can think of three (3) Supervisors. I don't remember if it was in November or not but I can think of three (3) Supervisors who left our employ during —

Q-25. Do you remember their names?

A., Yes, Allen Stanley was one, Mary Casey, and Bill Bowling.

Q-26. Now, were these three (3) people immediately replaced?

A., I wouldn't say immediately. They were replaced, yes. We changed the organization significantly during that period of time.

Q-27. Was a Jim Bowling fired?

A., No sir.

[224]

Q-28. Did he quit the Company?

A., I don't know exactly what his termination notice said but as I recall there was a conflict in his outside activities and he was asked to come to grips with the problem of whether or not he was able to work for the Company and give us his full interest. I don't think he was fired he was released and I

think he was given the option to resign of his own will.

Q-29. So, I guess then after these people were dismissed it was necessary for the other Supervisors to take up the slack, wasn't it?

A., Yes sir.

Q-30. And work additional hours?

A., Yes sir.

Q-31. So, actually before when you were talking about getting more involvement from the Supervisors, this is what you were expecting, you were expecting them to give more than just forty (40) hours a week?

A., No question about it, yes.

Q-32. Now, in regard to this Cost Goal, Mr. Clark asked you if Mr. Cummins was a member of that Cost Goal Club at the time he joined the World Wide Church [225] of God, I believe you answered yes?

A., I wasn't asked that question. I think that's correct, the timing was right. I would say that's true, but I don't believe I was asked that question.

Q-33. So, actually the Cost Goal group, the people who are allowed to join that are the people who are going to dedicate themselves to doing more than just, let's say, forty (40) hours a week work?

A., Yes, that's part of the requirement.

Q-34. If you had known that Mr. Cummins, or Management had known, were a member of this church and would not work on Saturdays would he have been allowed to join the Cost Goal group?

A., I would say that any person who was in a position where he could not fulfill the obligations of a Supervisor as our business requires would not be normally put on that type of a program.

Q-35. So when he would not work on Saturday he could not --

A., I didn't say that, that question has never arose.

Q-36. Well, I'm asking, would someone who refuses to work on Saturday be allowed to join?

A., Well, you're conjecturing now. I couldn't answer [226] that question because the problem has never been approached. I've never been asked that. I've never been forced to make that decision so I can't answer that question.

Q-37. How much effect do you think it has on the efficiency of Parker Seal Company if there is not an individual Supervisor in the Banbury Department on Saturday?

A., I would say it would probably be the same as any department that would operate without a Supervisor, it has an effect.

Q-38. Does it have the same effect on the second and third shift when there's no Supervisor?

A., We don't operate the Banbury on the third shift.

Q-39. Well, when its operated on the second? And I think it was your testimony earlier that sometimes it is operated on the third?

WITNESS: I'm not sure I understood the question.

Q-40. My first question was, how much effect on the efficiency does it have if there is not a full time Supervisor in the Banbury Department on Saturday?

A., I couldn't tell you exactly because I don't know.

[227]

Q-41. But I assume you think it is important that there be a Supervisor there?

A., I think that it's important for every department to have supervision, yes. I don't think it's important -- or I should say, I don't think we can afford to have a second shift Banbury Supervisor. We have only four (4) employees on the second shift.

Q-42. When Banbury works on Saturday does it always work a full shift, I mean the full Department is there?

A., To my knowledge, I'm not sure about that.

Q-43. Would there be any times when there'd be, say, only four (4) or five (5) men working on Banbury on Saturday?

A., I honestly can't answer that question, I don't know.

Q-44. So, would it be fair to say that the Company can afford to have a Supervisor in Banbury on Saturday if they're already using a Supervisor they've got, whereas on week days they would have to get an additional Supervisor? In other words, it doesn't cost the Company anything to have a Supervisor work Saturday in Banbury?

A., It doesn't cost the Company any additional to work [228] any Supervisor, it never costs any more to work any Supervisor Saturday, what costs us more is to work the hourly employees Saturday.

Q-45. But it would cost you more to have a Supervisor for the second shift?

A., For the second shift, that's correct.

MR. THOMAS L. HOGAN: I have no further questions.

INTERROGATION BY MR. JAMES A. CRUMLIN.

Q-1. Mr. Kuhn, do you know the reason why Paul Cummins was discharged?

A., I think I do, sir, yes.

Q-2. Can you tell us why he was discharged?

A., He was discharged because his refusal to work on Saturday was causing considerable consternation and problems with the rest of our employees who were being required to work a full shift.

Q-3. Do you know the reason why he couldn't work on Saturdays?

A., I was told the reason why he couldn't before he was terminated, yes.

Q-4. What was the reason?

A., That his religion prevented him.

[229]

Q-5. Was any effort made by the Company to work out the shifts so that he might carry on as an employee of the Company in conformance with his religion?

A., Sir, we operate the plant around the clock, twenty-four (24) hours a day. The Banbury works two (2) shifts and on occasion works Saturdays. If you're asking did we try to schedule Sunday instead of Saturday to accommodate Mr. Cummins, no, we did not.

Q-6. Who was it that complained about his not working Saturdays?

A., I am not aware initially of a complaint. My first involvement in this was when Mr. Haddock advised me that Paul was not working Saturdays.

refused to work Saturdays and that he was approaching him with that problem and that termination was possible. I did not ask at that time who was complaining.

INTERROGATION BY MRS. BELLE SMITH.

Q-1. He took Haddock's word for it that that was the case?

A., Since he is my Plant Manager, yes.

Q-2. But you did say that there was complaints?

[230]

A., Yes.

Q-3. You've just got that one (1) man Mr. Haddock that said it wasn't satisfactory?

A., Mr. Haddock is the one that made me aware of the complaints, yes.

INTERROGATION BY DR. A. R. LASLEY.

Q-1. Mr. Kuhn, is it the policy of your Company to terminate the contract of any employee who refuses to accept extra overtime work for any reason?

A., You have to differentiate, sir. Are you talking about hourly, salary, or whatever? I would say that the Company doesn't have a written policy,

as such. We expect all employees to work our schedule and I would say that any employee that refused to work our schedule would be subject to dismissal, yes, any employee.

INTERROGATION BY MR. FRED ANHOUSE.

Q-1. How about Sunday, have you ever had to schedule Sundays?

A., We have on occasion in emergency scheduled Sunday but I couldn't tell you exactly when or what was —

Q-2. What would your attitude be if you had people who [231] refused to work on Sunday?

A., I can't answer that question because I don't know the —

Q-3. Well, I'm just giving you a hypothetical case?

A., Alright, I'll give you, as best I can, a hypothetical answer. If I had an emergency in which I felt justified to ask someone to work, one of my salaried people, to work Sunday and he refused me. I would say that unless there were extremely extenuating circumstances I would be upset and if this sort of thing were indicative of his attitude then I would probably take some kind of disciplinary action. I have never had to ask my employees to work Sunday. Most of my employees, the ones I deal with

directly, are aware of the needs of the Company and normally volunteer on Sundays.

Q-4. What would your attitude be if you had to work on Christmas and somebody refused to work?

A., I find that difficult to answer, I've never had to work a Christmas. I would say, however, that if there were an emergency as far as Christmas was concerned, first of all, I would be willing to work Sunday and I have confidence that most of my Supervisros would also be willing to work.

[232]

Q-5. Would you reprimand them if they couldn't?

WITNESS: Pardon me?

MR. FRED ANHOUSE: If they refused what would you do, would you reprimand them?

A., I think I would have a talk with them, yes sir.

INTERROGATION BY MR. THOMAS L. HOGAN.

Q-1. Was Mr. Haddock the only person that you talked to about the problems with Mr. Cummins?

WITNESS: Prior to his dismissal or —

MR. THOMAS L. HOGAN: Prior to his dismissal.

A., Yes.

Q-2. And Mr. Haddock told you that Mr. Cummins would not work on Saturday because of his religion?

A., Yes.

Q-3. And that's the reason he was terminated?

A., Yes.

[233]

MR. THOMAS L. HOGAN: I have no further questions, Your Honor.

INTERROGATION BY MR. VERNON JOHNSON.

Q-1. If Mr. Haddock had not brought the problems about Mr. Cummins to you, would Mr. Haddock himself have had the authority as Plant Manager at Berea to make the decision whether to go along with Mr. Cummins or whether to terminate Mr. Cummins, or would that decision had to have been made at the Division Management level?

A., Well, I would say that as far as my wishes would be concerned that I am always anxious to know of any special arrangements with any employee. If he took it on himself to not advise me then certainly he's taking the authority himself.

Q-2. But he would have the authority if he assumed it? He would have the authority to term-

inate an employee or to keep an employee without consulting the Division Manager?

A., Well, any termination is reviewed by more than one (1) person. We're very careful to make sure that there aren't extenuating circumstances or personal conflicts in the termination. The [234] termination is never done by just one (1) person. There may be one (1) person's signature on the termination slip but, as a matter of fact, more than one (1) person is involved in the termination proceeding.

Q-3. If Mr. Haddock had been so disposed, as one (1) previous Plant Manager has testified that he was, had he been so disposed to go along with Mr. Cummins, would he have had authority to have done so or would that have been in conflict with his authority?

A., When you say to have authority, if he were to go along with it, say, and I became aware of the fact that it was causing problems then he would no longer have that authority, I'd have taken action.

MR. VERNON JOHNSON: Thank you.

MR. THOMAS L. HOGAN: I have no further questions.

MR. BENNETT CLARK: Your Honor, I have no further questions.

MR. JAMES A. CRUMLIN: Thank you so much, Mr. Kuhn.

* * * * *

[235]

MR. JAMES A. CRUMLIN: I wonder if at this time you would be kind enough to let the Commission go into executive session for five (5) minutes? Then, I guess, I will grant —

MR. THOMAS L. HOGAN: Mr. Crumlin, Mr. Clark and I have agreed before the hearing that we would, in this case, stress the law by submitting briefs, if it please the Commission.

MR. JAMES A. CRUMLIN: We'll get around to that after — let us have an executive session of a few minutes, if you please.

* * * * *

THE HEARING RECONVENED AFTER A FIVE (5) MINUTE EXECUTIVE SESSION OF THE COMMISSION MEMBERS.

MR. JAMES A. CRUMLIN: Gentlemen, we want to thank you for co-operating with us and letting us have a little session here. And at this point we are of the opinion that if [236] you want to submit briefs that we'll grant you time to submit the briefs. And with the briefs we don't feel that arguing the testimony would be necessary in as

much as you're going to submit the briefs. Unless you disagree with that and say so now, because we want each side to feel that we have been fair in what we think the law is, and that we can be convinced one way or the other here if you want to do so by your briefs. We have the evidence here. We think that you both had wide latitudes and we're going to have to act on what has been presented and not determine, as being evidence, whether or not a better case could have been presented by either side. We feel there are some things missing that we would liked to have had, but they're not, so we're going to have to act on what we do have. And your briefs then will be aiding that generalized decision. Mr. Clark, what Mr. Hogan has suggested here, I think is this, along with your briefs we should like to have you submit to us a finding of facts and conclusions of law and what orders [237] you think ought to be entered. Of course, it does not mean, as Mr. Hogan has found out here before, that we will accept them.

MR. THOMAS L. HOGAN: That's correct.

MR. JAMES A. CRUMLIN: Because we have some notions and ideas but we will be as fair as we possibly can be. And I think that if the Stenographer is going to have the transcript ready in two (2) weeks, fifteen (15) days from that date —

MR. BENNETT CLARK: Fifteen (15) days after the transcript is received?

MR. JAMES A. CRUMLIN: Yes, after the transcript is received and we receive these briefs simultaneously, there will be a need for usually fifteen (15), fifteen (15) after that before we can submit the final opinion. I don't think there's a whole lot of law we have on this particular point now but maybe you can convince us otherwise.

[238]

MR. BENNETT CLARK: There's a good bit, Your Honor.

MR. JAMES A. CRUMLIN: Alright, then you will submit what you have found and we will read them carefully and give you our opinion at a subsequent date.

MR. BENNETT CLARK: Your Honor, If I may ask a question, please, since it appears I'm so ignorant with everything and procedure here in particular, I have obtained separately bound copies of a Law Review article, which is particularly well informative to me on this procedure, which I would like to present to the Commission for its consideration but I don't know how I should go about doing that. Whether I should send it in our brief or — I don't have enough to give each member of the Commission a copy — whether I should just send you a copy or if you would tell me how I should send it. I have three (3) copies. It may be that — I

think probably, in all honesty to the opposing counsel it probably should not be submitted to you until our briefs are sent in.

[239]

MR. JAMES A. CRUMLIN: I would strongly suggest that you hold it and submit one (1) copy with your brief and you can point out any of the direct portions of this.

MR. BENNETT CLARK: Whose copy? I presume — do we send copies of the brief to every member of the Commission?

MR. JAMES A. CRUMLIN: We won't put that burden on you.

MR. BENNETT CLARK: Alright.

MR. JAMES A. CRUMLIN: You'll just give opposing counsel a copy and send a copy to the Commission itself. Then the Commission will be responsible for getting enough copies.

MR. BENNETT CLARK: Will the address of all those of the Commission be given to us?

[240]

MR. THOMAS L. HOGAN: Anything for the Commission can be sent to the Commission's office.

MR. BENNETT CLARK: Oh, I see.

MR. JAMES A. CRUMLIN: You send it to the Commission's office and let them be responsible for getting it to them.

* * * * *

THEREUPON THE FRIDAY, MARCH 3, 1972
HEARING IN THE MATTER OF PAUL CUM-
MINS, COMPLAINANT VS. PARKER SEAL
COMPANY, DIVISION OF PARKER-HANNIFIN
CORPORATION, RESPONDENT WAS CON-
CLUDED.

* * * * *

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON DIVISION

PAUL CUMMINS, PLAINTIFF

VS. JOINT MOTION TO SUBMIT
FOR TRIAL AND DETERMINATION

PARKER SEAL COMPANY,
A Division of Parker
Hannifin Corporation, DEFENDANT

CIVIL ACTION NO. 2432

* * * * *

Come the plaintiff and defendant, herein, by and through their respective counsel, and by Joint Motion to the Court, move that the above-captioned action be submitted to the Court for trial and determination on the record; and

It is further moved that the Court grant the plaintiff Forty-five (45) days from the date of the filing of the order of submission to file a brief in support of his claim and that the defendant be granted a period of Forty-five (45) days thereafter in which to submit his brief.

JAMES C. HICKEY
EWEN, MACKENZIE & PEDEN, P.S.C.
2100 Commonwealth Building
Louisville, Kentucky 40202

THOMAS L. HOGAN
205 South Fourth Street
Louisville, Kentucky 40202

Attorneys for Plaintiff

BY _____

* * * * *

FILED JAN. 24, 1973

UNITES STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON DIVISION

PAUL CUMMINS, PLAINTIFF

VS. ORDER OF SUBMISSION

PARKER SEAL COMPANY
A Division of Parker
Hannifin Corporation, DEFENDANT

CIVIL ACTION NO. 2432

* * * * *

The plaintiff, Paul Cummins, and the defendant, Parker Seal Company, having filed a Joint Motion with the Court to require submission of the above-captioned action for trial and determination on the record; and the Court being duly advised;

IT IS HEREBY ORDERED that the above-captioned action be and is hereby submitted for trial and determination on the record; and

It is further Ordered that the plaintiff, Paul Cummins, shall have Forty-five (45) days after entry of this order in which to submit a brief; and the

defendant, Parker Seal Company, shall have Forty-five (45) days after the submission of the plaintiff's brief or after the time for filing of the plaintiff's brief has expired in which to submit its brief; the within order being subject to any further orders of the Court.

/s/ Bernard T. Moynahan, Jr.
Judge, United States District
Court, Eastern District of
Kentucky

Dated: January, 24, 1973.

A True Copy Attest

/s/ Nancy C. Anderson

* * * * *

ORDER OF SUPREME COURT
OF MARCH 1, 1976

The motion of Trans World Airlines, Inc., for leave to file a brief, as *amicus curiae*, is granted. The petition for a writ of certiorari is granted.

OCT 29 1975

MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-478

PARKER SEAL COMPANY - - - Petitioner

versus

PAUL CUMMINS - - - Respondent

On Petition For a Writ of Certiorari to the United States
Court of Appeals For the Sixth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

JAMES C. HICKEY
EWEN, MacKENZIE & PEDEN, P.S.C.
2100 Commonwealth Building
Louisville, Kentucky 40202

and

THOMAS L. HOGAN
1288 Cherokee Road
Louisville, Kentucky 40204

*Counsel for Respondent, Paul
Cummins*

INDEX

	PAGE
Opinions Below.	1
Counterstatement.	2
Reasons for Denying the Writ.	3- 9
I. The Sixth Circuit Correctly Applied the Statute and E.E.O.C. Regulation to the Facts of This Case.	3- 5
II. Title VII of the Civil Rights Act of 1964 Does Not Violate the Establishment Clause of the First Amendment.	5- 8
III. Any Conflict of Views in the Sixth Circuit Should Be Resolved by That Court.	9
Conclusion.	9-10

AUTHORITIES CITED

Cases:

	PAGE
<i>Epperson v. Arkansas</i> , 393 U. S. 97 (1968)	6
<i>Griggs v. Duke Power Company</i> , 401 U. S. 424, 91 S. Ct. 849, 28 L. Ed. 2d 158 (1971)	4
<i>McGowan v. Maryland</i> , 366 U. S. 420 (1961)	6
<i>Public Education v. Nyquist</i> , 413 U. S. 756 (1973) . .	7
<i>Reid v. Memphis Publishing Co.</i> , 11 F.E.P. Cases 129 (CA 6, 1975)	9
<i>School District of Abington Township v. Schempp</i> , 374 U. S. 203 (1963)	6
<i>Sherbert v. Verner</i> , 374 U. S. 398 (1963)	7- 8
<i>Walz v. Tax Commissioner</i> , 397 U. S. 664, 90 S. Ct. 1409, 25 L. Ed. 2d 697 (1970)	6
<i>Wisconsin v. Yoder</i> , 406 U. S. 205 (1972)	8

Statutes:

Title VII of the Civil Rights Act of 1974, 42 U.S.C. §2000e, et. seq. 2, 4, 5, 6, 7, 8

Regulations:

29 C.F.R. §1605.1 (1974) 6, 8

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-478

PARKER SEAL COMPANY - - - - - *Petitioner*

v.

PAUL CUMMINS - - - - - *Respondent*

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT PAUL CUMMINS IN OPPOSITION

The respondent, Paul Cummins (hereinafter referred to as "Cummins"), opposes the Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 516 F. 2d 544 and 10 F.E.P. Cases 974.

COUNTERSTATEMENT

Cummins was hired by Parker Seal Company in 1958. In 1965 he became a supervisor. In 1970 he became a member of the World Wide Church of God. One of the tenets of that church is that the adherent could not work from sundown on Friday to sundown on Saturday. Cummins advised Parker Seal of this religious need and for 14 months he worked as a supervisor without being required to work on his Sabbath. A change in plant managers at the Parker Seal plant at Berea, Kentucky, coupled with complaints of fellow employees of Cummins, caused Cummins to be presented with an ultimatum: violate the tenets of your religious faith or be fired. He was fired on September 3, 1971.

The majority opinion of the Sixth Circuit carefully sets forth the facts and concludes that Parker Seal had provided reasonable accommodation to Cummins' religious needs for 14 months, and had not made any showing of undue hardship on the conduct of the employer's business at the time Cummins was fired.

The decision is clearly correct on the facts. Contrary to the introductory statement of petitioner, this case only presents the Court with the opportunity to consider whether the prohibition against employment discrimination because of religion contained in Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, et. seq., violates the establishment clause of the First Amendment to the Constitution of the United States.

REASONS FOR DENYING THE WRIT

I.

The Sixth Circuit Correctly Applied the Statute and E.E.O.C. Regulation to the Facts of this Case

For all of its exaggerated statements in its petition concerning the effect of Cummins' failure to work on his Sabbath and its effect on Parker Seal production, petitioner is left with one hard fact: Cummins was fired, after an accommodation of over a year, because his absence from work on Saturday caused complaints from other employees.

The Sixth Circuit found as a matter of law that:

"The objections and complaints of fellow employees, in and of themselves, do not constitute undue hardship in the conduct of an employer's business." 516 F. 2d 544, 550.

The Court conceded that such complaints and attendant morale problems could lead to chaotic personnel problems which would amount to undue hardship, but correctly found that such was in no way the fact in this case.

Parker Seal attempts to twist the reasonable accommodation of Cummins religious needs for over a year and the absence of any undue hardship on it during that period to its advantage by claiming that it was penalized because of these facts.

Parker Seal was not, as it claims, estopped from proving undue hardship in the conduct of its business. Parker Seal did not, and indeed could not, establish

facts which amounted to an undue hardship at the time Paul Cummins was fired. Nothing had changed in the 14 months Cummins was reasonably accommodated except a change in plant managers and an increase in the complaints of fellow employees. Parker Seal management reacted by telling Cummins to work on Saturday or be fired.

The Company's theory as adopted by the Kentucky Commission on Human Rights and presumably the District Court was that since the policy of requiring all employees to work on Saturdays was uniformly applied, it was acceptable (App. A, p. 5a). This is not the law as enunciated by this Court in *Griggs v. Duke Power Company*, 401 U. S. 424, 427, 91 S. Ct. 849, 28 L. Ed. 2d 158 (1971):

"The Act (Title VII) proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation."

* * * * *

"But Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation. More than that, Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question."

The Kentucky Commission on Human Rights and the District Court misapplied the applicable law, and the legal error was corrected by the Court of Appeals.

The company's contention that there were difficulties after Cummins converted and that this new

situation was not ideal from a management viewpoint, can in no way be construed to constitute "undue hardship." Admittedly, there may often be some complaints and even morale problems which develop because an employer complies with Title VII. Anything—any law—which affects the status quo and brings about change will be disliked by many.

The production employees in a plant cannot be allowed to determine what laws the employer will obey in a plant. Congress has set forth the public policy of the United States which requires that employers not discriminate against employees because of their religion. This requirement only has meaning if the E.E.O.C. and the Courts require employers to seriously consider the religious needs of employees.

The Sixth Circuit was correct in holding that Parker Seal had failed to meet its burden of proving undue hardship, and the writ should be denied.

II.

Title VII of the Civil Rights Act of 1964 Does Not Violate the Establishment Clause of the First Amendment

The First Amendment to the Constitution of the United States provides, in pertinent part, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." This Court has frequently grappled with the tensions existing between the Free Exercise Clause and the Establishment Clause. The effort of the Court has been to find a neutral course between the two clauses, "both

of which are cast in absolute terms, and either of which, if expanded to a logical extreme would tend to clash with the other." *Walz v. Tax Commissioner*, 397 U. S. 664, 669, 90 S. Ct. 1409, 25 L. Ed. 2d 697 (1970).

In *Committee for Public Education v. Nyquist*, 413 U. S. 756, 772 (1973) this Court in reviewing its previous decisions outlined its standards:

"Taken together, these decisions dictate that to pass muster under the Establishment Clause the law in question, first must reflect a clearly secular legislative purpose, e.g., *Epperson v. Arkansas*, 393 U. S. 97, (1968); second, must have a primary effect that neither advances nor inhibits religion, e.g., *McGowan v. Maryland*, 366 U. S. 420, (1961); *School District of Abington Township v. Schempp*, 374 U. S. 203, (1963); and, third, Must avoid excessive government entanglement with religion, e.g., *Walz v. Tax Commissioner*, *supra*.

The pertinent statute, 42 U.S.C. Sec. 2000 (e) (j) and regulation, 29 C.F.R. Sec. 1605.1 meets these tests and are fully consistent with the First Amendment.

Congress, in legislating the portion of Title VII applicable to religious discrimination, sought to provide a setting where all religions, regardless of their various tenets, could be freely exercised.

Parker argues that by requiring an employer to accommodate the religious needs of employees Congress has violated the First Amendment. That logic would mean that by outlawing religious discrimination at all, Congress violated the First Amendment.

As stated by the Sixth Circuit:

"In practice, the reasonable accommodation rule restrains employers from enforcing uniform work rules that, although facially neutral, discriminate in effect against employees holding certain religious convictions." 516 F. 2d 544, 553.

The Court went on to point out that there is no direct relationship between government and the religion at all. Congress was concerned with the relationship between the employer and employee and to insure that said employee was not penalized for exercising his right to practice a religion.

In *Sherbert v. Verner*, 374 U. S. 398 (1963), this Court in replying to a contention that the Court's resolution of the issue would foster an establishment of religion, said: "Payment will be made to her not as a Seventh Day Adventist, but as an employed worker," 374 U. S. 398 at 412.

This Court recognized in *Sherbert v. Verner*, *supra*, that the effect of the declaration of ineligibility for unemployment insurance for refusal to work on Saturday forced the plaintiff to choose "between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand," 374 U. S. 398 at 404.

Such a dilemma, imposes a burden on the free exercise of religion. The religious accommodation provision of Title VII requires no more than does *Sherbert*. Both require that the employee's religious beliefs and the free exercise thereof be taken into account, and that

no penalty or burden be imposed upon the employee as a consequence of his religious beliefs unless a compelling state interest is demonstrated (which was not the case in *Sherbert*) in a state action case or "undue hardship" is shown (which was not the case in this action) in a private employer case brought pursuant to Title VII. See also *Wisconsin v. Yoder*, 406 U. S. 205 (1972).

The burden which Parker had to meet in this case to demonstrate that the religious discrimination prohibited by Title VII breached the Establishment Clause required more than a finding that some religious purpose or effect was involved in Title VII. They had to go further and show that the religious accommodation provision of Title VII and E.E.O.C. Regulation 1605.1(b) promote any one of the evils against which the Establishment Clause protects.

Title VII and the E.E.O.C. regulation are not absolute. An individual's religious beliefs must give way to an employer's needs. An employee's beliefs and practices must give way if an employer can demonstrate said practices are unreasonable or that the practices will do "undue hardship" to the employer. It is a practical statute designed to allow for the religious diversity for which our forefathers fought, while, at the same time, allowing employers to compete in the business world.

The Sixth Circuit has correctly concluded that there is no conflict between Title VII and the Constitution, and the Writ should be denied.

III.

Any Conflict of Views in the Sixth Circuit Should Be Resolved by That Court

Respondent must candidly admit that he is as perplexed as petitioner by the recent decision of the Sixth Circuit in *Reid v. Memphis Publishing Co.*, 11 F.E.P. Cases 129 (CA 6, 1975).

The *Reid* case may well point out the fact that each case involving a "reasonable accommodation" and "undue hardship" must stand on its own set of facts. Without agreeing to the correctness of the *Reid* decision, it should be pointed out that Title VII does not require every employer, in every circumstance, to accommodate the religious needs of every employee.

A Petition for Rehearing and Suggestion for En Banc review was filed by Reid in the Sixth Circuit on September 29, 1975. No decision has been rendered on this request as of this date. The task of justifying and reconciling the *Reid* decision with this case is properly before the Sixth Circuit at this time.

CONCLUSION

The decision of the Sixth Circuit in this case is factually correct. The only reason which could possibly justify grant of the Writ is the conviction that Congress could not constitutionally require employers not to discriminate against employees and potential employees because of their religion. Title VII strikes the proper balance between the free exercise and es-

tablishment clauses of the First Amendment. For the foregoing reasons, respondent Paul Cummins, submits that the Petition for a writ of certiorari should be denied.

Respectfully submitted,

JAMES C. HICKEY
EWEN, MACKENZIE & PEDEN, P.S.C.
2100 Commonwealth Building
Louisville, Kentucky 40202

and

THOMAS L. HOGAN
1288 Cherokee Road
Louisville, Kentucky 40204

*Counsel for Respondent, Paul
Cummins*

IN THE
Supreme Court of the United States
OCTOBER TERM, 1975

Supreme Court, U. S.

FILED

MAY 15 1976

MICHAEL RODAK, JR., CLERK

No. 75-478

PARKER SEAL COMPANY, *Petitioner*

v.

PAUL CUMMINS, *Respondent*

On Writ of Certiorari to the United States
Court of Appeals for the Sixth Circuit

BRIEF FOR PETITIONER

PATRICK F. J. MACRORY

LEONARD H. BECKER

PAUL S. RYERSON

1229 Nineteenth Street, N.W.

Washington, D. C. 20036

—and—

BENNETT CLARK

1000 First Security Plaza

Lexington, Kentucky 40507

Of Counsel:

Attorneys for Petitioner

Parker Seal Company

ARNOLD & PORTER

1229 Nineteenth Street, N.W.

Washington, D.C. 20036

STOLL, KEENON & PARK

1000 First Security Plaza

Lexington, Kentucky 40507

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISIONS, STATUTES, AND GUIDELINE INVOLVED	2
QUESTIONS PRESENTED	3
STATEMENT OF THE CASE	4
Introductory Statement	4
Parker Seal's Operation And Cummins' Supervisory Role	5
Parker Seal's Efforts To Accommodate Cummins' Religious Demands	6
Parker Seal's Declining Profitability And Operating Difficulties	7
Legal Proceedings Below	11
ARGUMENT	13
SUMMARY	13
I. THE 1972 "RELIGIOUS ACCOMMODATION" AMENDMENT AND EEOC'S 1967 GUIDELINE VIOLATE THE ESTABLISHMENT CLAUSE	15
A. The "Religious Accommodation" Provisions Impose Special Burdens Upon Private Employers On Exclusively Religious Grounds	15
B. The 1972 Amendment And 1967 Guideline Cannot Survive This Court's Tripartite Establishment Clause Test	19
1. The Purpose Underlying The 1972 Amendment Is Purely Sectarian	20
a. The Legislative History Reveals An Exclusively Non-Secular Motive	20

	Page
b. A Secular Purpose Cannot Be Found In Supposed Efforts To Avert Religious Dis- crimination	24
c. The Amendment And Guideline Do Not Re- flect An Accommodation Of Secular Inter- ests	26
2. The Primary Effect Of The 1972 Amendment And The 1967 Guideline Is To Advance Re- ligion	28
3. The "Religious Accommodation" Provisions Foster Divisive Entanglement Of Govern- mental And Religious Activity	33
C. The "Religious Accommodation" Scheme Is Not Required To Preserve The Free Exercise Rights Of Employees	38
II. THE COURT OF APPEALS MISCONSTRUED THE STATUTE AND GUIDELINE IN CONCLUDING THAT PARKER SEAL DID NOT SATISFY ITS OBLIGATION TO ATTEMPT AN ACCOMMODATION WITH CUMMINS	41
A. The Court Of Appeals Erred In Taxing Parker Seal For Its Past Efforts At Accommodation	42
B. The Record Amply Supports The Conclusion Of The District Court That Parker Seal Satis- fied Its Statutory Obligation	44
CONCLUSION	56

TABLE OF AUTHORITIES

CASES:

<i>Abington School Dist. v. Schempp</i> , 374 U.S. 203 (1963)	20, 28, 30, 37
<i>Albemarle Paper Co. v. Moody</i> , 422 U.S. 405 (1975) ..	19
<i>Ashwander v. TVA</i> , 297 U.S. 288 (1936)	42
<i>Bd. of Educ. v. Allen</i> , 392 U.S. 236 (1968)	31, 32
<i>Bradley v. School Board</i> , 416 U.S. 696 (1974)	18
<i>Braunfield v. Brown</i> , 366 U.S. 599 (1961)	27, 28

	Page
<i>Claybaugh v. Pac. Northwest Bell Tel. Co.</i> , 355 F. Supp. 1 (D. Ore. 1973)	24, 42, 48, 53, 54
<i>Committee for Public Educ. v. Nyquist</i> , 413 U.S. 756 (1973)	20, 21, 28, 29, 32, 33, 40
<i>Cummins v. Parker Seal Co.</i> , 516 F.2d 544 (1975)	18, 51
<i>Davis v. Beason</i> , 133 U.S. 333 (1890)	40
<i>Dawson v. Mizell</i> , 325 F. Supp. 511 (E.D. Va. 1971) ..	41, 54
<i>Dewey v. Reynolds Metals Co.</i> , 429 F.2d 324 (6th Cir. 1970), <i>aff'd by equally divided court</i> , 402 U.S. 689 (1971)	17, 39, 45, 48
<i>Dixon v. Omaha Public Power Dist.</i> , 385 F. Supp. 1382 (D. Neb. 1974)	47, 50
<i>Draper v. United States Pipe & Foundry Co.</i> , 527 F.2d 515 (6th Cir. 1975)	18, 25, 42, 51
<i>Drum v. Ware</i> , 7 E.P.D. ¶ 9244 (W.D.N.C. 1974)	49, 53
EEOC Dec. No. 70-773, CCH EEOC Dec. ¶ 6154 (1970)	47
<i>Engel v. Vitale</i> , 370 U.S. 421 (1962)	23
<i>Epperson v. Arkansas</i> , 393 U.S. 97 (1968)	20, 31
<i>Everson v. Bd. of Educ.</i> , 330 U.S. 1 (1947)	29, 31, 32
<i>Franks v. Bowman Transp. Corp.</i> , — U.S. —, 44 U.S. L.W. 4356 (March 24, 1976)	19
<i>Gallagher v. Crown Kosher Super Market</i> , 366 U.S. 617 (1961)	27
<i>Gillette v. United States</i> , 401 U.S. 437 (1971)	23, 27, 28, 31, 33, 34, 35, 36
<i>Griggs v. Duke Power Co.</i> , 401 U.S. 424 (1971) ...	14, 18, 19
<i>Hamilton v. Regents of Univ. of California</i> , 293 U.S. 245 (1934)	40
<i>Hansard v. Johns-Manville Prod. Corp.</i> , 5 E.P.D. ¶ 8543 (E.D. Tex. 1973)	37
<i>Hardison v. Trans World Airlines, Inc.</i> , 375 F. Supp. 877 (W.D. Mo. 1974), <i>rev'd on other grounds</i> , 527 F.2d 33 (8th Cir. 1975), <i>cert. pending</i> , No. 75- 1126	24, 49, 54
<i>Hunt v. McNair</i> , 413 U.S. 734 (1973)	21
<i>Jackson v. Veri Fresh Poultry, Inc.</i> , 304 F. Supp. 1276 (E.D. La. 1969)	24
<i>Jacobson v. Massachusetts</i> , 197 U.S. 11 (1905)	40
<i>Johnson v. United States Postal Service</i> , 497 F.2d 128 (5th Cir. 1974), <i>aff'g</i> 364 F. Supp. 37 (N.D. Fla. 1973)	47, 49, 54
<i>Jordan v. North Carolina Nat'l Bank</i> , 399 F. Supp. 172 (W.D.N.C. 1975)	38

	Page
<i>Kettell v. Johnson & Johnson</i> , 337 F. Supp. 892 (E.D. Ark. 1972)	17, 53
<i>Lemon v. Kurtzman</i> , 403 U.S. 602 (1971)	20, 21, 28, 31, 37
<i>Linscott v. Millers Falls Co.</i> , 440 F.2d 14 (1st Cir.), cert. denied, 404 U.S. 872 (1971)	39
<i>McGowan v. Maryland</i> , 366 U.S. 420 (1961)	27, 28
<i>Meek v. Pittenger</i> , 421 U.S. 349 (1975)	19, 21, 29, 31, 32
<i>Otten v. Baltimore & Ohio R.R.</i> , 205 F.2d 58 (2d Cir. 1953)	38
<i>Presbyterian Church v. Mary Elizabeth Blue Hull Church</i> , 393 U.S. 440 (1969)	34
<i>Prince v. Massachusetts</i> , 321 U.S. 158 (1944)	40
<i>Reid v. Memphis Pub. Co.</i> , 521 F.2d 512 (6th Cir. 1975), cert. pending, No. 75-1105	17, 42, 47, 51, 53, 54
<i>Reynolds v. United States</i> , 98 U.S. 195 (1878)	40, 41
<i>Riley v. Bendix Corp.</i> , 330 F. Supp. 583 (M.D. Fla. 1971), rev'd, 464 F.2d 1113 (5th Cir. 1972)	45, 47
<i>Roberts v. Hermitage Cotton Mills</i> , 8 E.P.D. ¶ 9589 (D.S.C.), aff'd, 8 E.P.D. ¶ 9597 (4th Cir. 1974)	49
<i>Shaffield v. Northrup Worldwide Aircraft Services, Inc.</i> , 373 F. Supp. 937 (M.D. Ala. 1974)	25, 49, 54
<i>Sherbert v. Verner</i> , 374 U.S. 398 (1963)	27, 39
<i>Sloan v. Lemon</i> , 413 U.S. 825 (1973)	21, 32, 33
<i>Tilton v. Richardson</i> , 403 U.S. 672 (1971)	20, 21, 29
<i>Torcaso v. Watkins</i> , 367 U.S. 488 (1961)	23, 29
<i>Two Guys From Harrison-Allentown, Inc. v. McGinley</i> , 366 U.S. 582 (1961)	27
<i>United States v. City of Albuquerque</i> , 9 E.P.D. ¶ 10,182 (C.D. Cal. 1975)	45, 50, 52, 53
<i>United States v. Rumely</i> , 345 U.S. 41 (1953)	42
<i>United States v. Seeger</i> , 380 U.S. 163 (1965)	41
<i>Walz v. Tax Commission</i> , 397 U.S. 664 (1970)	20, 27, 28, 29, 30, 31, 32, 33, 34, 37
<i>Ward v. Allegheny Ludlum Steel Corp.</i> , 397 F. Supp. 375 (W.D. Pa. 1975), appeal pending (3d Cir.) ..	50
<i>Weitzenaut v. Goodyear Tire & Rubber Co.</i> , 381 F. Supp. 1284 (D. Vt. 1974)	25, 50
<i>Williams v. Southern Union Gas Co.</i> , 529 F.2d 483 (10th Cir. 1976), cert. pending, No. 75-1511	46, 53
<i>Wisconsin v. Yoder</i> , 406 U.S. 205 (1972)	33, 36, 40
<i>Zorach v. Clauson</i> , 343 U.S. 306 (1952)	31

CONSTITUTION AND STATUTES:

U. S. Constitution, First Amendment	2, 4, 5, 13, 14, 20, 38, 39, 40, 45
28 U.S.C. § 1254(1)	2
42 U.S.C. § 2000e:	
(2)(a)(1)	2, 15, 24, 46
(j)	2, 17, 33

REGULATIONS:

29 C.F.R. § 1605.1 (1974)	2, 3, 16
---------------------------------	----------

CONGRESSIONAL MATERIALS:

110 Cong. Rec. (1964)	26
118 Cong. Rec. (1972)	21, 22, 23, 35
S. Rep. No. 92-681, 92d Cong., 2d Sess. 15 (1972)	23
H.R. Rep. No. 92-899, 92d Cong., 2d Sess. 15 (1972) ..	23

OTHER AUTHORITIES:

Edwards & Kaplan, "Religious Discrimination and the Role of Arbitration Under Title VII," 69 Mich. L. Rev., 599 (1971)	30, 38
--	--------

IN THE
Supreme Court of the United States
OCTOBER TERM, 1975

No. 75-478

PARKER SEAL COMPANY, *Petitioner*

v.

PAUL CUMMINS, *Respondent*

On Writ of Certiorari to the United States
Court of Appeals for the Sixth Circuit

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. 13a) is reported at 516 F.2d 544. The opinion of the district court (Pet. 7a) is unreported. The opinion of the Kentucky Commission on Human Rights (Pet. 1a) is unreported.¹

JURISDICTION

The judgment of the court of appeals was entered May 23, 1975 (Pet. 59a). A timely petition for rehear-

¹“Pet.” refers to Parker Seal’s petition for certiorari. “R.” refers to the single appendix filed herewith.

ing was denied by order entered July 18, 1975 (Pet. 61a). A timely petition for a writ of certiorari was filed September 25, 1975. The Court granted the writ of certiorari on March 1, 1976 (R. 246). The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1).

**CONSTITUTIONAL PROVISIONS, STATUTES,
AND GUIDELINE INVOLVED**

The Establishment Clause of the First Amendment provides: "Congress shall make no law respecting an establishment of religion"

Section 703(a)(1) of the Civil Rights Act of 1964, as amended, provides:

"It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's race, color, religion, sex, or national origin. . . ." 42 U.S.C. § 2000e-2(a)(1) (1974).

Section 701(j) of the Civil Rights Act of 1964, as amended, provides:

"The term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business." 42 U.S.C. § 2000e(j) (1974).

Guideline 1605.1 of the United States Equal Employment Opportunity Commission provides:

"(a) Several complaints filed with the Commission have raised the question whether it is discrimination on account of religion to discharge or refuse to hire employees who regularly observe Friday evening and Saturday, or some other day of the week, as the Sabbath or who observe certain special religious holidays during the year and, as a consequence, do not work on such days.

"(b) The Commission believes that the duty not to discriminate on religious grounds required by Section 703(a)(1) of the Civil Rights Act of 1964, includes an obligation on the part of the employer to make reasonable accommodations to the religious needs of employees and prospective employees where such accommodations can be made without undue hardship on the conduct of the employer's business. Such undue hardship, for example, may exist where the employee's needed work cannot be performed by another employee of substantially similar qualifications during the period of absence of the Sabbath observer.

"(c) Because of the particularly sensitive nature of discharging or refusing to hire an employee or applicant on account of his religious beliefs, the employer has the burden of proving that an undue hardship renders the required accommodations to the religious needs of the employee unreasonable.

"(d) The Commission will review each case on an individual basis in an effort to seek an equitable application of these guidelines to the variety of situations which arise due to the varied religious practices of the American people." 29 C.F.R. § 1605.1 (1975).

QUESTIONS PRESENTED

Title VII of the 1964 Civil Rights Act, as amended, and the EEOC's "religious accommodation" guide-

line promulgated thereunder, require an employer to justify the discharge of an employee who refuses to perform regularly scheduled work for religious reasons, by showing that reasonable accommodation to the employee's religious requirements would impose undue hardship on the conduct of its business. The questions presented in the case are:

1. Whether the foregoing statute and guideline, which require an employer to accord preferential treatment to selected employees solely on the basis of their religious beliefs, violate the Establishment Clause of the First Amendment.

2. Whether the court of appeals erred in determining that an employer which has tried, unsuccessfully, to accommodate an employee who refuses to work regularly scheduled Saturdays is barred from showing that its continued efforts impose undue hardship.

STATEMENT OF THE CASE

Introductory Statement

This case presents two questions: whether the "religious accommodation" section of the Civil Rights Act of 1964, as amended, and a companion EEOC "guideline" can pass muster under the Establishment Clause of the First Amendment, and if they can, whether they have been correctly construed by the court of appeals below.²

² In light of the limited relief sought by Parker Seal in connection with the third question presented in the petition for certiorari, relating to conflicting panel decisions in the Sixth Circuit (Pet. 3, 22-24), that question may be deemed mooted by this Court's grant of plenary review.

After a year-long effort at accommodation, the petitioner, Parker Seal Company, discharged Paul Cummins, a plant supervisor who refused to work on Saturdays despite the company's demonstrated need for his services on that day.³ Following a full evidentiary hearing, the Kentucky Commission on Human Rights ruled that Parker Seal could not accommodate Cummins' religious needs without placing an undue hardship on the conduct of its business. The United States District Court for the Eastern District of Kentucky reached the same conclusion, and added that Parker Seal had made a reasonable effort to accommodate Cummins' religious beliefs. But the Court of Appeals for the Sixth Circuit reversed because, in its view, Parker Seal had failed to demonstrate that Cummins' continued employment would engender "chaotic personnel problems," or that such employment would have some other "dire effect" upon Parker Seal's business. Judge Celebrezze dissented on the ground that the applicable federal statute and guideline violate the Establishment Clause of the First Amendment.

Parker Seal's Operation and Cummins' Supervisory Role

Parker Seal owns and operates an "o-ring" factory in Berea, Kentucky, where the company manufactures various rubber products from synthetic rubber compounds (R. 57; *see* R. 35). Throughout the early 1970's, the Berea plant has employed about 600 workers on two and sometimes three shifts (R. 57, 132, 231). Goods are produced in response to bookings (R.

³ Parker Seal Company is the Kentucky trade name of Parker Corporation, formerly Parker-Hannifin Corporation.

100), and must be delivered shortly after receipt of orders (R. 220). The normal work week is five days, with Saturday work scheduled where necessary to keep up with orders; six-day weeks are frequently required (R. 135).

Cummins was hired by Parker Seal in 1958 (R. 53). In 1965 he became supervisor of the first shift of eight to 10 men in the "Banbury" (or rubber mixing) department of the Berea plant (R. 55, 56). As a supervisor, Cummins was salaried, and "not restricted to punching the time clock" (R. 78); so far as the union collective bargaining agreement was concerned, he was "part of management" (R. 79). Cummins was "responsible for the [Banbury] Department, an investment of thousands of dollars, and a group of people" (R. 205).

Cummins' supervisory position required him to be present whenever the first shift was operating, including Saturdays (R. 231). For five years Cummins voiced no objection to working on that day (R. 84).

Parker Seal's Efforts To Accommodate Cummins' Religious Demands

In July 1970, Cummins became a member of the World Wide Church of God, which forbids work from sundown on Friday to sundown on Saturday (R. 37). Previously, when he had first become interested in the Church, Cummins had taken off just the time needed to attend Saturday church services with his family; these usually lasted about two hours (R. 40, 104). However, upon assuming full membership, Cummins refused to work on Saturdays at all (R. 104).

Parker Seal took no immediate action against Cummins. To the contrary, the Berea plant manager assured Cummins that he "still had a job and . . . could observe [his] . . . Sabbath" (R. 66). For 14 months the company accommodated Cummins' religious views by requiring supervisors from the adjacent Stock Prep department to cover the Banbury department on the first Saturday shift (R. 63). Generally this involved one supervisor's covering both departments at the same time, although the plant manager regarded this as "absolutely not" good operating procedure and an arrangement that could not continue indefinitely (R. 124-25, 129). On those Saturdays when Stock Prep did not work, a substitute from among the other supervisors in the Berea plant was required to come in to work exclusively to cover the Banbury (R. 150). For that added work, the substitute supervisor received no extra pay (R. 156).

Meanwhile, Cummins drew a set salary whether or not he worked Saturdays (R. 188). Indeed, by virtue of his seniority, he continued to receive more pay than many of his fellow supervisors (R. 197). He never offered to take less pay for not being available to work on Saturdays (R. 101).

Parker Seal's Declining Profitability and Operating Difficulties

The profitability of the division which included Parker Seal's Berea operation had started to decline in 1968 and reached a low ebb in early 1970 (R. 207). In October of that year the company laid off a large number of both hourly and salaried employees at Berea (R. 208). The Berea plant had "a deteriorating morale factor," and the "output per person had dropped significantly in that period of time" (R. 209).

In November 1970, the plant manager was transferred and a new manager was brought in (R. 209-10). At once he recognized that "there were economic problems and supervisory [problems] and we had to get them straightened out or we were on our way to . . . folding it up" (R. 173). The new plant manager was instructed "to solicit and, in effect, to insist on longer hours, more personal interest, more involvement on the part of the Supervision" (R. 210).

In particular, the new manager was concerned about the Banbury department, where he had heard there were problems even before he arrived (R. 131, 175). The Berea Banbury exhibited "a tremendous lack of consistency from day to day and from shift to shift regarding the efficiency and the output," particularly on the unsupervised second shift (R. 218-19). Significantly, the output of the Banbury was little better than half that of the "almost identical" Parker Seal plant in Winchester, Kentucky (R. 218). Nonetheless, when the new manager learned of Cummins' Saturday absenteeism, he assured Cummins: "[A]s long as it don't cause any problems I have no objections to you observing the Sabbath" (R. 69). Ultimately, however, the new manager concluded that Cummins' presence in the Banbury department was required on Saturdays. As he testified:

"[Cummins'] religion . . . didn't bother me at that time, one way or the other. The fact that he could not work Saturday did. We run a plant that operates six (6) days a week a good percentage of the time. Paul, in a responsible position, running a department, had to be there if that department was to function the way it should" (R. 180).

Cummins disagreed. He adhered to the view that his job was more one of scheduling than of supervision. In his opinion, he could handle all necessary scheduling on Friday, in advance of Saturday work (R. 99).⁴

During the summer of 1971, as the result of substantial overtime work, the other supervisors were working as much as 72 hours a week with no increase in pay (R. 140, 176-77). Cummins continued at his usual 40-hours-a-week pace (R. 177). The other supervisors began to complain (R. 144, 177). As one of them put it, "I respected Paul's religion but . . . if he was scheduled to work, he should work on Saturday" (R. 145). The plant manager could not overlook the smoldering resentment among Cummins' fellow supervisors:

"[W]hen it came down to [Cummins'] . . . interaction with this other group of three (3) Supervisors, the four (4) of them represented almost one quarter ($\frac{1}{4}$) of our Supervisory force, his effect on them and the way they were feeling. I had direct complaints from two (2) of them,

⁴ Ostensibly for the same reason, Cummins declined to come in with his shift two hours early in the morning in response to scheduled morning overtime; he judged his presence unnecessary until later in the morning, when he could begin his scheduling work (R. 177). By contrast, all other supervisors at the Berea plant adhered to company policy that they must work the same hours as the men for whom they were responsible, even when circumstances required those hours to be extended to irregular times (R. 121, 158, 166-67, 169). Although the new plant manager put out a memo to remind the supervisors that they "were required to come in with [their] . . . men . . . whenever they were on the job" (R. 158), Cummins refused to do so (R. 177). The plant manager felt he "could live with that," although it gave rise to a doubt in his mind (R. 204).

that forced, actually forced me into a decision. I had to do something to get one quarter ($\frac{1}{4}$) of my Supervisory force straightened out" (R. 204).

Consistently with his assigned directive to stimulate plant morale, the new plant manager did "not believe in giving orders to Supervisors, I suggest to them and expect them to work it out themselves" (R. 178). Thus, he told Cummins that "if he was to be able to work with these three (3) fellows down in Stock Prep, he was going to have to go down and volunteer to take on a four (4) hour period for them in the evening" (R. 185). Despite this advice, Cummins volunteered to relieve a fellow supervisor only about half a dozen times over a 14-month period—once as a "forced volunteer," when a fellow worker "got after" him to relieve an ailing colleague (R. 142, 155, 183-84; *see* R. 141).

In the summer of 1971, the plant manager told Cummins he needed a man to work six days a week, and urged him to reconsider his position on Saturday work (R. 71, 175). Cummins refused. On September 3, 1971, he was discharged (R. 72).⁵ He was terminated because the Parker Seal management, having attempted for 14 months to defer to his religious practices, determined that it could no longer accommodate his continued unavailability for work on Saturdays. As the plant manager put it in his contemporaneous notification, Cummins was let go because he was "unable to work all days scheduled for work" (R. 181).

⁵ Transfer to a lower grade was barred by Parker Seal's collective bargaining agreement with the union (*see* R. 72, 99).

Legal Proceedings Below

Upon his discharge, Cummins filed grievances against Parker Seal with both the Kentucky Commission on Human Rights (the "KCHR") (R. 26) and the United States Equal Employment Opportunity Commission (the "EEOC") (R. 6). Before the KCHR, Cummins' counsel explicitly disclaimed any contention that Parker Seal had "intended to discriminate against Mr. Cummins or anyone else of his religion by having this Saturday working policy" (R. 30).

After a full evidentiary hearing, the KCHR dismissed Cummins' complaint. The Kentucky Commission found that during the period in which Parker Seal permitted Cummins to take Saturdays off, "all [other] supervisory personnel . . . were required to work all hours and days of scheduled regular and scheduled overtime work in their respective departments on their respective shifts"; also, that "Cummins refused to report for scheduled hours and days of regular and overtime work on his shift in his department but lost no wages or benefits as the result of his refusal to work for religious reasons" (Pet. 3a-4a). The Commission applied Kentucky law, which in its view embodied essentially verbatim the original Civil Rights Act of 1964 together with the EEOC's Guideline 1605.1, as revised in 1967. It concluded that Parker Seal could not "accommodate [Cummins'] . . . religious needs without placing an undue hardship on the conduct of [its] business" (Pet. 6a).

Following the EEOC's failure to take action on Cummins' complaint and the agency's issuance of a "right to sue" letter (R. 10), Cummins brought the

present action against Parker Seal in the United States District Court for the Eastern District of Kentucky (R. 1). The parties stipulated to the record before the KCHR (R. 242). On that record, the district court agreed with the KCHR that Parker had

“ . . . made a reasonable accommodation to the plaintiff's religious needs and that no further accommodation could be made at the time of the [plaintiff's] . . . dismissal from employment without creating an undue hardship on the employer's business.

“The defendant was therefore justified in discharging the plaintiff” (Pet. 8a-9a).

On appeal, the Court of Appeals for the Sixth Circuit reversed, one judge dissenting. 516 F.2d 544 (Pet. 13a). For himself and Judge McCree, Chief Judge Phillips concluded that under both the applicable EEOC guideline and the Civil Rights Act of 1964, as amended, Parker had failed to demonstrate “chaotic personnel problems,” or any other “dire effect upon the operation of its business.” 516 F.2d, at 550 (Pet. 29a). The court suggested that Parker Seal “could have required Appellant to work . . . on Sundays,” *ibid.*—even though Cummins was already present on the few Sundays on which the Banbury functioned (R. 63, 135, 198). Alternatively, the court said, Parker “could have reduced Appellant's salary commensurately with his shorter work week,” *Ibid.*—thereby cutting his pay almost in half. Finally, the court taxed Parker for its one-year effort at accommodation, professing inability to understand “why an accommodation that was reasonable for over a year . . . suddenly became unreasonable in September 1971.” 516 F.2d, at 547 (Pet. 20a).

The court of appeals also rejected Parker Seal's constitutional claim that the applicable provisions of the Civil Rights Act and EEOC guideline violate the Establishment Clause of the First Amendment. The court conceded that “some religious institutions will derive incidental benefits” from the guideline and statute. 516 F.2d, at 553 (Pet. 36a). But it discounted the expressed view of the sponsor of the 1972 statutory amendment that the legislation was designed to counteract the “dwindling of the membership of some . . . religious organizations” (remarks of Sen. Randolph); that argument by one Senator, in the court's view, did “not require the conclusion that Congress enacted the legislation to promote and support a *particular religion*.” *Ibid.* (emphasis supplied). Rather, the court concluded, the statute and regulation could be salvaged because they “are applicable to *all* members of *all* religious faiths who observe Saturday as the Sabbath.” 516 F.2d, at 553 (Pet. 37a) (emphasis in original). The court professed to see no violation of the Establishment Clause in this acknowledged federal legislative aid to Sabbatarian religious activity.

Judge Celebrezze dissented. In his view, the statute and guideline had both the purpose and primary effect of promoting and advancing particular religious sects, and therefore violated the Establishment Clause. 516 F.2d, at 554-60 (Pet. 41a-57a).

ARGUMENT

SUMMARY

As construed and enforced by the court below, the “religious accommodation” provisions of Title VII

compel the private employer to alter his practices, and even to suffer detriments to his business, at the insistence of any employee who asserts that his religious practices conflict with job-related work schedules. By invoking governmental power to force one citizen to yield in this fashion to the religious dictates of another, the "accommodation" provisions violate the Establishment Clause of the First Amendment. Whether judged by the purpose for which the "religious accommodation" provisions were added to Title VII, by their primary effect, or by the ongoing entanglement of religious and secular issues and institutions necessitated by administration of the "accommodation" requirement, the provisions at issue cannot survive constitutional scrutiny.

On the facts of this case, the court below has erred in any event in imposing an unrealistic burden on the employer—*first*, by relying incorrectly upon the employer's good faith efforts to attempt accommodation as evidence of the invalidity of his ultimate determination that accommodation was no longer possible; and *second*, by failing to attribute proper significance to the evidence in the record which supports the determination—as made by Parker Seal in the first place, and subsequently by the State human rights commission and the district court—that continued accommodation of Cummins' religious practices would impose an undue hardship upon Parker Seal's business operations. The obligation thus fashioned by the court of appeals differs altogether from the fundamental duty to avoid discrimination in employment mandated by Title VII, as originally enacted and as implemented by this Court in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

L The 1972 "Religious Accommodation" Amendment and EEOC's 1967 Guideline Violate the Establishment Clause

The "religious accommodation" provisions cannot withstand constitutional scrutiny—particularly not as construed and enforced by the court of appeals below. The provisions violate the cardinal principle of governmental neutrality towards religion in their necessary effect, in the purpose for which the 1972 statutory amendment was offered, and in the entangling influence of the statutory scheme. That scheme requires private employers to accord preferential treatment to selected employees, even at the sacrifice of legitimate business interests, solely on account of those employees' religious beliefs. Moreover, the provisions cannot be justified as necessary to protect the free exercise interests of employees—those interests are already served by the original proscription in Title VII of religious discrimination in private employment.

A. THE "RELIGIOUS ACCOMMODATION" PROVISIONS IMPOSE SPECIAL BURDENS UPON PRIVATE EMPLOYERS ON EXCLUSIVELY RELIGIOUS GROUNDS

Section 703(a)(1) of the Civil Rights Act of 1964, as enacted and as it has stood at all pertinent times, provides in relevant part:

"It shall be an unlawful employment practice for an employer . . . to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . religion. . . ." 42 U.S.C. § 2000e-2(a)(1) (1974).

In 1967 the EEOC promulgated guidelines, purportedly to implement the statutory mandate against religious discrimination. 29 C.F.R. § 1605.1.⁶ The guidelines fashioned an unprecedented obligation on the part of the employer to defer to his employees' professed religious beliefs. The Commission stated:

"... the duty not to discriminate on religious grounds, required by section 703(a)(1) of the Civil Rights Act of 1964, includes an obligation on the part of the employer to make reasonable accommodations to the religious needs of employees and prospective employees where such accommodations can be made without undue hardship on the conduct of the employer's business." § 1605.1(b).

Further, the Commission placed upon the employer the burden of substantiating his case under the "religious accommodation" provisions. § 1605.1(c).⁷

⁶ The 1967 guidelines provide in pertinent part:

"... [S]ection 703(a)(1) of the Civil Rights Act of 1964 ... includes an obligation on the part of the employer to make reasonable accommodations to the religious needs of employees and prospective employees where such accommodations can be made without undue hardship on the conduct of the employer's business.

"... [T]he employer has the burden of proving that an undue hardship renders the required accommodations to the religious needs of the employee unreasonable." 29 C.F.R. § 1605.1 (1975).

⁷ The 1967 guidelines replaced an earlier version, promulgated in 1966, which had imposed a less onerous burden on the employer to accommodate the religious practices of his employees. 31 Fed. Reg. 8370. The 1966 guidelines had required no accommodation whatever if such efforts would have resulted in either a serious inconvenience to the employer or a disproportionate allocation of unfavorable work. Further, the guidelines authorized the employer to prescribe a work week applicable to all his employees, even if

Some courts questioned whether the EEOC's 1967 revised guidelines were authorized by Title VII's original prohibition of religious discrimination. *Dewey v. Reynolds Metals Co.*, 429 F.2d 324, 331, n.1, 334 (6th Cir. 1970), *aff'd by equally divided Court*, 402 U.S. 689 (1971); *Kettell v. Johnson & Johnson*, 337 F. Supp. 892, 895 (E.D. Ark. 1972).⁸ Those questions led Congress in 1972 to amend the original statute to add the following definition of the term "religion" as Section 701(j) of the Act:

"The term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business." 42 U.S.C. 2000e(j) (1974).⁹

his schedule did not operate uniformly in its impact upon their religious practices. Specifically, the guidelines provided:

"The employer may prescribe the normal work week and foreseeable overtime requirements, and, absent an intent on the part of the employer to discriminate on religious grounds, a job applicant or employee who accepted the job knowing or having reason to believe that such requirements would conflict with his religious obligations is not entitled to demand any alteration in such requirements to accommodate his religious needs."

⁸ The questioning has recently been renewed in the Sixth Circuit. *Reid v. Memphis Pub. Co.*, 521 F.2d 512, 519 (6th Cir. 1975), *cert. pending*, No. 75-1105.

⁹ The parties do not dispute the applicability of either Guideline 1605.1 or the 1972 statutory amendment, even though the discharge complained of occurred in 1971 (*see* Pet. 12, n.6). At all relevant times, Parker Seal's Berea operations were governed by Kentucky law which, as construed by the state human rights commission,

That statutory definition thus incorporated the "religious accommodation" theory of the EEOC's revised 1967 guideline. *Draper v. United States Pipe & Foundry Co.*, 527 F.2d 515, 517, n.1 (6th Cir. 1975); *Cummins v. Parker Seal Co.*, 516 F.2d, at 547 (Pet. 19a).¹⁰

imposed an "obligation to reasonably accommodate the religious beliefs" of its employees (Pet. 6a). The state law paralleled the EEOC's 1967 guidelines, which had been adopted more than four years before Cummins' discharge. Moreover, the 1972 amendment was in effect when Cummins filed his civil action in the district court. In these circumstances, application of the "accommodation" provision of the 1972 amendment to this case was unobjectionable. See *Bradley v. School Board*, 416 U.S. 696, 711 (1974).

¹⁰ The obligations imposed upon Parker Seal and other private employers by the "religious accommodation" provisions go far beyond those before this Court in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). There, in the context of asserted racial discrimination, the Court declared:

"Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed. What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification." 401 U.S., at 431.

And again:

"Far from disparaging job qualifications as such, Congress has made such qualifications the controlling factor, so that race, religion, nationality, and sex become irrelevant. What Congress has commanded is that any tests used must measure the person for the job and not the person in the abstract." *Id.*, at 436 (emphasis supplied).

The 1972 amendment and EEOC guideline run counter to those objectives. First, the "accommodation" provisions require a "discriminatory preference," based upon considerations of religion. Far from rendering religious views irrelevant, they dictate that the private employer must alter his business practices, or depart from them altogether, in deference to the professed religious beliefs of his employees. [Footnote continued on next page.]

B. THE 1972 AMENDMENT AND 1967 GUIDELINE CANNOT SURVIVE THIS COURT'S TRIPARTITE ESTABLISHMENT CLAUSE TEST

The Court's "three-part test," evolved in recent Establishment Clause cases, requires no extended exposition.

"First, the statute must have a secular legislative purpose. . . . Second, it must have a 'primary effect' that neither advances nor inhibits religion. . . . Third, the statute and its administration must avoid excessive government entanglement with religion." *Meek v. Pittenger*, 421 U.S. 349, 358

Second, unlike the situation presented in other aspects of Title VII enforcement, it does not suffice for the employer challenged under the "religious accommodation" provisions to show that his work rules are reasonably related to the jobs which his employees are to perform. Cf. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 436 (1975); *Griggs v. Duke Power Co.*, 401 U.S., at 432. Once an employee claims infringement of his religious liberty, the employer must "accommodate" himself to the demands engendered by that liberty; further, he must assume a "hardship" in reaching that accommodation—even a substantial one, unless a federal court ultimately decides that the "hardship" is "undue."

Third, unlike the situations presented in *Griggs* and *Albemarle Paper*, the efficient operation of the employer's business will not be enhanced by compliance with the "accommodation" provisions. Imposition of the obligation to "accommodate" does not eliminate an irrational vestige of past discrimination—for there need not have been any. Nor does it induce the employer to run his business without regard to irrelevant racial, sexual or other personal characteristics of his employees. To the contrary, the employer confronted with a demand for religious preference is forced by the statutory scheme to introduce discriminatory practices into his operations, and to defer to a religious criterion which is surely irrelevant to productivity, which may be counterproductive to his business, and which may adversely and unfairly affect the interests of other, nonreligiously motivated employees. Cf. *Franks v. Bowman Transp. Corp.*, — U.S. —, —, 44 U.S.L.W. 4356, 4368 (Mar. 24, 1976) (opinion of Powell, J.).

(1975) (plurality opinion of Stewart, J.) (citations omitted). *Accord*, *Committee for Public Educ. v. Nyquist*, 413 U.S. 756, 772-73 (1973); *Tilton v. Richardson*, 403 U.S. 672, 678 (1971) (plurality opinion of Burger, C.J.); *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971); *Walz v. Tax Commission*, 397 U.S. 664, 674 (1970).¹¹

A statute challenged on Establishment Clause grounds must satisfy each branch of the Court's three-part test. Thus, "[i]f either [the purpose or primary effect of the enactment] is the advancement . . . of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution." *Epperson v. Arkansas*, 393 U.S. 97, 107 (1968); *Abington School Dist. v. Schempp*, 374 U.S. 203, 222 (1963). *Accord*, *Committee for Public Educ. v. Nyquist*, 413 U.S., at 774. Similarly, the excessive "entanglement" of governmental with sectarian activity is alone sufficient to warrant invalidation of legislation. *Lemon v. Kurtzman*, 403 U.S., at 613-15.

Here, we submit, the challenged statutory scheme cannot pass muster under any of the three established criteria.

1. *The Purpose Underlying the 1972 Amendment Is Purely Sectarian*

a. *The Legislative History Reveals an Exclusively Non-Secular Motive*

In the past this Court has consistently taken at face value the legislature's statement of its purpose in adopting legislation challenged on Establishment

¹¹ See also *infra*, at 37 n.19 (discussing the separate views of Mr. Justice Brennan).

Clause grounds. *Meek v. Pittenger*, 421 U.S., at 363 (plurality opinion); *Sloan v. Lemon*, 413 U.S. 825, 829-30 (1973); *Committee for Public Educ. v. Nyquist*, 413 U.S., at 773; *Hunt v. McNair*, 413 U.S. 734, 741-42 (1973); *Tilton v. Richardson*, 403 U.S., at 678-79 (plurality opinion); *Lemon v. Kurtzman*, 403 U.S., at 613. The same rule should apply here.

The evidence of legislative intent underlying the 1972 "religious accommodation" amendment points to an exclusively non-secular, sectarian purpose. The provision arose as a floor amendment sponsored by Senator Randolph. 118 Cong. Rec. 705 (1972). The Senator's sponsoring remarks reveal that advancement of religion—specifically, those religions which observe the Sabbath other than on Sunday—was the sole purpose for which the amendment was offered.

"I am sure that my colleagues are well aware that there are several religious bodies—we could call them *religious sects*; denominational in nature—not large in membership, but with certain strong convictions, *that believe there should be a steadfast observance of the Sabbath and require that the observance of the day of worship, the day of the Sabbath, be other than on Sunday*. On this day of worship work is prohibited whether the day would fall on Friday, or Saturday or Sunday. There are approximately 750,000 men and women who are Orthodox Jews in the U.S. work force who fall in this category of persons I am discussing. There are an additional 425,000 men and women in the work force who are Seventh Day Adventists.

* * *

"I say to the distinguished chairman of the Labor and Public Welfare Committee, who manages this bill, that there has been a partial refusal

at times on the part of employers to hire or continue in employment *employees whose religious practices rigidly require them to abstain from work in the nature of hire on particular days*. So there has been, because of understandable pressures, such as commitments of a family nature and otherwise, *a dwindling of the membership of some of the religious organizations* because of the situation to which I have just directed attention.

* * *

"My own pastor in this area, Rev. Delmar Van Horne, has expressed his concern and distress that *there are certain faiths that are having a very difficult time*, especially with the younger people and understandably so, with reference to a possible inability of employers on some occasions to adjust to work schedules to fit the requirements of the faith of some of their workers." 118 Cong. Rec. 705 (emphasis supplied).

Time and again, Senator Randolph stressed his objective—to benefit Saturday Sabbatarians, of which he himself was one.¹²

¹² "Mr. President, I am a member of a denomination which is a relatively small one, the Seventh-Day Baptists. Perhaps there are only 5,000 individuals within that denomination in the work force. I do think it is important for me to say that within the groups that I have mentioned, we think in terms of our observance of the Sabbath beginning at sundown Friday evening and ending at sundown Saturday evening, following the Biblical words, 'From eve unto eve shall you celebrate your Sabbath.' I make this statement only by way of explanation of the groups I have just mentioned.

* * *

"I hold my membership in our church here in this area. We have the Washington Seventh Day Baptist Church. We have several of those churches in my State of West Virginia. At an earlier period I held my membership in the Salem, W.Va., Seventh Day Baptist Church. [Footnote continued on next page.]

Thereafter, without further debate, Senator Randolph's proposed amendment passed the Senate by a vote of 55-0. 118 Cong. Rec. 731. The provision was retained after conference, with only a passing reference made in the Conference Committee report. H.R. Rep. No. 92-899, 92d Cong., 2d Sess. 15 (1972); S. Rep. No. 92-681, 92d Cong., 2d Sess. 15 (1972). Likewise, the provision received only a cursory reference on the House floor prior to passage by that body. 118 Cong. Rec. 7569 (1972).

The foregoing history is devoid of indication that Congress intended other than to advance religious interests. Rather, the history reveals an "abandon[ment of] secular purposes in order to put an imprimatur on one religion, or on religion as such, or to favor the adherents of any sect or religious organization." *Gillette v. United States*, 401 U.S. 437, 450 (1971); see *Engel v. Vitale*, 370 U.S. 421, 430-31 (1962); *Torcaso v. Watkins*, 367 U.S., 488, 495 (1961).

"I invite the attention of my able colleague to the fact that in the State of New Jersey there are many, many Seventh Day Baptist churches. In places like Shiloh, Marlboro, and Plainfield—actually being the headquarters of the denomination to which I belong, located close to New York City, but actually located in the State of New Jersey.

* * *

"I refer to the presence in the Chambers of our colleague from Ohio (Mr. Saxbe). There are, in the Seventh Day Baptist Church, of which I am a member, many individual members of our faith who belong to our churches within the State of Ohio. We have, usually, small churches in small communities in the state the Senator so ably represents.

"I add also the Senator from Colorado. I think it is not inappropriate for me to say that one of our strong churches is in Denver. Another of our strong churches is in Boulder, in the State of Colorado. . . ." 118 Cong. Rec. 705-06.

b. *A Secular Purpose Cannot Be Found in Supposed Efforts to Avert Religious Discrimination*

In the face of the foregoing legislative history of the 1972 amendment, the court below purported to detect the requisite secular purpose in a supposed Congressional wish "to put teeth in the existing prohibition of religious discrimination." 516 F.2d, at 552 (Pet. 33a).¹³ But there is no factual basis for that theory.

First, at all times the language of the 1964 statute has prohibited religious discrimination in hiring or advancement.¹⁴ Even without the 1972 amendment, the federal courts surely could implement the original provision by striking down sophisticated as well as simple-minded modes of religious discrimination.¹⁵ As

¹³ Cf. *Hardison v. Trans World Airlines, Inc.*, 375 F. Supp. 877, 888 (W.D. Mo. 1974), *rev'd on other grounds*, 527 F.2d 33 (8th Cir. 1975), *cert. pending*, No. 75-1126, 75-1385.

¹⁴ Section 703(a)(1) of the Civil Rights Act of 1964, as amended, provides in pertinent part:

"It shall be an unlawful employment practice for an employer . . . to . . . discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . religion. . . ." 42 U.S.C. § 2000e-2(a)(1) (1974).

¹⁵ For example, in *Jackson v. Veri Fresh Poultry, Inc.*, 304 F. Supp. 1276 (E.D. La. 1969), the unrefuted testimony of the plaintiff showed that she was fired by her foreman for not working after sundown on Fridays on the supposed authority of the plant superintendent—who had previously told her he did not think her taking off early would be a problem. Similarly, in *Claybaugh v. Pac. Northwest Bell Tel. Co.*, 355 F. Supp. 1, 5 & n.8 (D. Ore. 1973), the employer regularly permitted union deviations from employees' work schedules sought on other than religious grounds—deviations which could have been, but were not, extended to the plaintiff. [Footnote continued on next page.]

Judge Celebrezze noted below,

"Striking down the religious accommodation rule would not change the law requiring employers to disregard religion in employment decisions. Discrimination based on religion is illegal. If a Saturday Sabbath observer can show that an employer discharged him for refusing to work on Saturdays although similarly situated employees were not required to work on Saturdays or were exempted from Sunday work, he could maintain that the actual reason for his discharge was religious discrimination, not his refusal to work on Saturdays." 516 F.2d, at 559-60 (Pet. 55a).

Second, the legislative history of the 1972 amendment contains no suggestion that the existing prohibition of religious discrimination in Title VII was deemed inadequate. For that matter, there was sparse evidence of religious discrimination before Congress

Again, in *Shaffield v. Northrop Worldwide Aircraft Services, Inc.*, 373 F. Supp. 937, 944 (M.D. Ala. 1974), positions suitable to accommodate the aggrieved plaintiff, where "his religious practices would be no burden to the defendant or its work," were filled instead by employees newly hired or recalled. Finally, in *Weitzenaut v. Goodyear Tire & Rubber Co.*, 381 F. Supp. 1284 (D. Vt. 1974), the employer refused to excuse the plaintiff one Friday night a month—even when the employee was willing to take a job transfer and to arrange for willing and available substitutes, and the employer had previously adjusted the work schedules of others for both religious and non-religious reasons. Episodes such as these could properly be treated as indicia of religious discrimination, forbidden by the original Title VII without regard to the "accommodation" structure. In sum, there is no reason to suppose that where circumstances require, the federal courts cannot identify a "case where [the] . . . discharge [is] . . . pretextual, masking a latent bias against [the employee's] . . . faith or against him for adhering to it." *Draper v. United States Pipe & Foundry Co.*, 527 F.2d 515, 524 (6th Cir. 1975) (Engel, J., dissenting).

when it originally enacted Title VII in 1964. According to Congressman Celler, Chairman of the House Judiciary Committee:

"We did not have very much testimony of discriminations on the grounds of religion. You will notice in one of the titles, religion is left out. . . .

We had very little evidence—I do not think we had any of it insofar as the Committee on the Judiciary is concerned that any particular sect or religion had been discriminated against." 110 Cong. Rec. 1528 (1964).

Third, the "religious accommodation" provisions undermine rather than enhance the objective of defeating discrimination in employment—indeed, they compel discrimination. As Judge Celebrezze put it:

"Section 2000e(j) defines religion so as to require that persons receive preferential treatment because of their religion. This contradicts the secular purpose behind the original Title VII. Rather than 'putting teeth' into the Act, it mandates religious discrimination, thus departing from the Act's basic purpose." 516 F.2d, at 556. (Pet. 45a-46a).

c. *The Amendment and Guideline Do Not Reflect an Accommodation of Secular Interests*

The majority below also sought refuge in the proposition that the "religious accommodation" provisions merely

" . . . reflect a legislative judgment that, as a practical matter, certain persons will not compromise their religious convictions and that they should not be punished for the supremacy of conscience." 516 F.2d, at 552-53 (Pet. 35a).

This argument is fallacious for two reasons. *First*, the interest of persons like Cummins in enhancing their religious activity at the expense of their work-related obligations cannot be described as "secular"—*ex hypothesis*, it is "sectarian." *Second*, as Judge Celebrezze pointed out, 516 F.2d, at 556 (Pet. 46a), the employer's maintenance of job-related assignments cannot be characterized as "punishment." By itself, the lack of any punitive purpose or effect disposes of the court of appeals' reliance upon *Gillette v. United States*, *supra*, which was a criminal prosecution for refusal to submit to induction. See 516 F.2d, at 552 (Pet. 34a).

The court of appeals also professed to find support for its discovery of an overriding secular objective in the "Sunday closing" decisions of this Court.¹⁶ That too was erroneous. Those decisions all rest on the conclusion that although Sunday-closing statutes had religious origins, their present overriding purpose and effect are largely secular—to set aside "one uniform day of rest for all workers." *Sherbert v. Verner*, 374 U.S. 398, 408 (1963).

The "Sunday closing" cases rest additionally on accepted tradition. A like consideration led this Court to sustain the long-standing practice of exempting religious entities from state property taxes. *Walz v. Tax Commission*, 397 U.S., at 672-73. No such historical tradition of governmentally compelled obeisance by

¹⁶ *McGowan v. Maryland*, 366 U.S. 420 (1961); *Two Guys from Harrison-Allentown, Inc. v. McGinley*, 366 U.S. 582 (1961); *Braunfeld v. Brown*, 366 U.S. 599 (1961); *Gallagher v. Crown Kosher Super Market*, 366 U.S. 617 (1961).

one man to another's religion supports the 1967 guideline or 1972 amendment.

Finally, the "Sunday closing" cases confirm the correctness of Parker Seal's position. For, in the view of at least one member of this Court, those cases hold that the States may compel the Saturday Sabbatarian "to choose between his religious faith and his economic survival . . . in the interest of enforced Sunday togetherness. . . ." *Braunfeld v. Brown*, 366 U.S. 599, 616 (1961) (Stewart, J., dissenting). Surely Parker Seal—which is under no constitutional obligation to further the free exercise of its employees' religious beliefs (*see infra*, at 38-39)—can require a departmental supervisor to report to work whenever his men are scheduled to do so.¹⁷

2. *The Primary Effect of the 1972 Amendment and the 1967 Guideline Is to Advance Religion*

On this branch of the Court's three-part Establishment Clause test, the crucial question is whether the

¹⁷ The court of appeals also stressed the absence of "financial support . . . for religious institutions." 516 F.2d, at 553 (Pet. 36a). The point was hardly dispositive. For the Establishment Clause does more than forbid a formal "state religion," *Committee for Public Educ. v. Nyquist*, 413 U.S., at 771; *Lemon v. Kurtzman*, 403 U.S., at 612. It does not "simply bar a congressional enactment establishing a church." *Abington School Dist. v. Schempp*, 374 U.S., at 220; *McGowan v. Maryland*, 366 U.S., at 441. The Clause reaches beyond state subsidies and tax benefits for religious groups to proscribe the Government's nonfinancial "sponsorship" of religious organizations as well. *Committee for Public Educ. v. Nyquist*, 413 U.S., at 772; *Walz v. Tax Commission*, 397 U.S., at 668; *Lemon v. Kurtzman*, 403 U.S., at 612. In sum, the Clause "forbids subtle departures from neutrality, . . . as well as obvious abuses." *Gillette v. United States*, 401 U.S., at 452; *Walz v. Tax Commission*, 397 U.S., at 696 (opinion of Harlan, J.).

"principal or primary effect [of the legislative program] advances religion." *Tilton v. Richardson*, 403 U.S., at 679 (plurality opinion); *cf. Committee for Public Educ. v. Nyquist*, 413 U.S., at 783, n.39. Here, the sole effect of the 1972 amendment and the EEOC guideline is to advance religion. In violation of this Court's specific mandate, the provisions at issue both "aid all religions" and "prefer one religion over another." *Walz v. Tax Commission*, 397 U.S., at 670; *Everson v. Bd. of Educ.*, 330 U.S. 1, 15 (1947).

First, the "religious accommodation" provisions "aid all religion as against non-believers . . ." *Walz v. Tax Commission*, 397 U.S., at 695 (opinion of Harlan, J.); *id.*, at 713 (Douglas, J., dissenting); *Torcaso v. Watkins*, 367 U.S. 488, 495 (1961). The assistance which these provisions extend to "predominantly church-related, nonpublic [activities] . . . inescapably results in the direct and substantial advancement of religious activity, . . . and thus constitutes an impermissible establishment of religion." *Meek v. Pittenger*, 421 U.S., at 366 (plurality opinion) (footnote omitted); *cf. Committee for Public Educ. v. Nyquist*, 413 U.S., at 781-83 & n.39; *Everson v. Bd. of Educ.*, 330 U.S., at 15.

The court below conceded that certain religious institutions would benefit from the "accommodation" provisions, in that "churches holding services on Saturdays may enjoy a somewhat larger attendance with a correspondingly fuller collection plate," 516 F.2d, at 553 (Pet. 36a)—precisely the purpose expressed by Senator Randolph in sponsoring the 1972 amendment. The court of appeals thereby recognized that the "religious accommodation" requirement "imposes a priority of the religious over the secular." Edwards

& Kaplan, "Religious Discrimination and the Role of Arbitration Under Title VII," 69 *Mich. L. Rev.* 599, 628 (1971). As Judge Celebrezze put it,

"Only those with 'religious practices' may benefit from the rule. Others are forced to submit to uniform work rules and to bear the burdens imposed by their employers' accommodation to religious practitioners. Thus, the rule discriminates against those with no religion, although the freedom not to believe is within the First Amendment's protection." 516 F.2d, at 558 (Pet. 51a).

The discrimination feared by Judge Celebrezze is evident on the record in this case. For over a year, Cummins' fellow employees were required to take up the slack occasioned by his absence; at one point, Cummins was adhering to his customary 40-hour schedule at the same time that fellow supervisors continued to put in up to 70 hours a week—with no increase in pay, and at an annual salary in some instances lower than his (R. 140, 176-77, 197).

Second, the challenged provisions "effect . . . favoritism among sects" *Walz v. Tax Commission*, 397 U.S., at 695 (opinion of Harlan, J.); *Abington School Dist. v. Schempp*, 374 U.S., at 305 (opinion of Goldberg, J.). In practice, the "religious accommodation" provisions impose on employers the views of those who observe the Sabbath on Saturdays, or who otherwise believe that their religious views mandate deference by others. The majority below conceded as much when it urged that the law did not run afoul of the Establishment Clause because the statute applies to "all members of all religious faiths *who observe Saturday as the Sabbath*." 516 F.2d, at 553 (Pet. 37a) (emphasis supplied). That contention proves that the

statutory scheme and guideline effectively discriminate among religions. As Judge Celebrezze noted below:

"Only those [religious sects] which require their followers to manifest their belief in acts requiring modification of an employer's work rules benefit, while other employees are inconvenienced by the employer's accommodation. By singling out particular sects for government protection, the Federal Government has forfeited the pretense that the rule is merely part of the general ban on religious discrimination." 516 F.2d, at 558 (Pet. 51a-52a).

Thus, because they aid both religion generally and some religions over others, the "religious accommodation" provisions violate the guiding principle of neutrality—"perhaps the central purpose of the Establishment Clause" *Gillette v. United States*, 401 U.S., at 449. The provisions depart from the constitutionally mandated attitude on the part of Government that "shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma." *Meek v. Pittenger*, 421 U.S., at 395-96 (opinion of Rehnquist, J.); *Walz v. Tax Commission*, 397 U.S., at 669; *Zorach v. Clauson*, 343 U.S. 306, 313 (1952). *Accord*, *Lemon v. Kurtzman*, 403 U.S., at 656 (opinion of Brennan, J.); *Epperson v. Arkansas*, 393 U.S., at 103-04; *Bd. of Educ. v. Allen*, 392 U.S. 236, 249 (1968) (Harlan, J., concurring); *Everson v. Bd. of Educ.*, 330 U.S., at 18.

The "religious accommodation" provisions cannot be salvaged on the theory that they somehow extend favored treatment to a broad class of employees, of

whom some happen to be religiously motivated—on their face, the provisions do no such thing. The “accommodation” scheme thus contrasts tellingly with other statutes which have survived Establishment Clause scrutiny. Prominent among these is the state property tax exemption for charitable and non-profit entities sustained in *Walz v. Tax Commission*, *supra*, which extended not only to religious and social service organizations, but also to scientific, literary, bar, library, patriotic, and historical groups. *See* 397 U.S., at 689 (Brennan, J., concurring); *id.*, at 696-97 (opinion of Harlan, J.). To like effect, the Court has concluded, is State aid to *all* schoolchildren, including those attending sectarian schools—aid such as the provision of busing, *Everson v. Bd. of Educ.*, *supra*, and textbooks, *Meek v. Pittenger*, 421 U.S., at 359-62 (plurality opinion), 388 (opinion of Rehnquist, J.); *Bd. of Educ. v. Allen*, *supra*.

On the other hand, the Court has consistently invalidated legislative schemes whose benefits have flowed, not even exclusively, but only “*primarily* to the parents of children attending sectarian, nonpublic schools.” *Committee for Public Educ. v. Nyquist*, 413 U.S., at 794 (emphasis supplied). *See also id.*, at 804 (Burger, C.J., dissenting); *cf. Meek v. Pittenger*, 421 U.S., at 389 (opinion of Rehnquist, J.); *Sloan v. Lemon*, 413 U.S., at 830. The case against this statute and guideline is even stronger. The *sole* beneficiaries of the “religious accommodation” scheme are those who espouse religious views—other interests go unprotected. To paraphrase Mr. Justice Brennan, religious concerns are “injected” into a non-religious context, and religious activity is “promoted”—not just “specially,” but to the exclusion of any other.

Cf. Walz v. Tax Commission, 397 U.S., at 689 (Brennan, J., concurring).

The very “narrowness of the . . . class . . . benefited” by the “accommodation” provisions underscores that the primary impact of this scheme is forbidden religious advancement. *Cf. Committee for Public Educ. v. Nyquist*, 413 U.S., at 794. Even more than state tuition grants to parents of children in private sectarian schools—grants declared unconstitutional in *Committee for Public Educ. v. Nyquist*, *supra*, and in *Sloan v. Lemon*, *supra*—the “accommodation” provisions confer special benefits on a class of persons determined strictly on religious grounds.

In sum, it cannot be said that the “accommodation” provisions are either “evenhanded in operation” or “neutral in primary impact.” *Gillette v. United States*, 401 U.S., at 450. Rather, “an exception from a general obligation of citizenship on religious grounds [has] . . . run afoul of the Establishment Clause. . . .” *Wisconsin v. Yoder*, 406 U.S. 205, 220-21 (1972).

3. The “Religious Accommodation” Provisions Foster Divisive Entanglement of Governmental and Religious Activity

The “entangling” influence of the 1972 amendment and the EEOC guideline manifests itself in a two-step process. *First*, the concept of “religious belief” which qualifies for protection under the “accommodation” provisions is necessarily broad and far-reaching. The 1972 amendment speaks not simply of “religion,” but of “*all aspects* of religious observance and practice, as well as belief.” Section 701(j), 42 U.S.C. § 2000e

(j) (emphasis supplied). The “indeterminate scope” of the statutory provision enhances the dangers of entanglement. *Gillette v. United States*, 401 U.S., at 458. For “‘the more . . . complicated the basis of classification for an exemption—even a neutral one—the greater the potential for state involvement’ in determining the character of persons’ beliefs and affiliations, thus ‘entangl[ing] government in difficult classifications of what is or is not religious.’” *Gillette v. United States*, 401 U.S., at 457, relying upon *Walz v. Tax Commission*, 397 U.S., at 698-99 (opinion of Harlan, J.).¹⁸

Second, the breadth of the “religious accommodation” provisions leads inevitably to extensive review, first by the EEOC and then by the courts, of every phase of the employee’s religious claim—the activities of his religious sect, the manifestations of that sect’s beliefs, and the *bona fides* of the employee who seeks relief under the statute. As the Court said in *Gillette*,

“To view the problem of fairness and even-handed decisionmaking . . . as merely a commonplace chore of weeding out ‘spurious claims,’ is to minimize substantial difficulties of real concern to a responsible legislative body.” 401 U.S., at 456.

Indeed, Senator Randolph contemplated—and endorsed—precisely such involvement, as witnessed by the colloquy accompanying his introduction of the 1972 amendment:

“Mr. Dominick. Am I correct in understanding that the amendment allows *flexibility* both to the

¹⁸ Cf. *Presbyterian Church v. Mary Elizabeth Blue Hull Church*, 393 U.S. 440 (1969).

EEOC and to its investigators to determine whether or not any particular group of religious adherents are having their customary observance of their religious activities unduly interfered with? In *other words, flexibility is provided so that someone could make a discretionary judgment on it?*

“Mr. Randolph. The Senator from Colorado correctly follows me in the thinking that I have placed in the language of the amendment that *there would be such flexibility*, there would be this approach of understanding, *even perhaps of discretion*, to a very real degree.” 118 Cong. Rec. 706 (1972) (emphasis supplied).

Such “flexible” and “discretionary” bureaucratic judgment will inevitably give rise to the danger of “erratic decisionmaking” which this Court has previously identified as a primary source of improper entanglement. *Gillette v. United States*, 401 U.S., at 458.

Judge Celebrezze foresaw the dangers of entanglement posed by the “accommodation” scheme:

“Disposition of complaints under the [1972] amendment will require inquiry into the sincerity with which beliefs are held and force consideration of the validity of the religious nature of claims, procedures which are not favored and may themselves be improper because they put courts in review of religious matters.” 516 F.2d, at 559 (Pet. 54a) (footnote omitted).

Here, the entanglement takes on the added vice that the employee who claims a religiously motivated exemption from the work rules of his employer is permitted by the “accommodation” scheme to assert his

professed religious beliefs as a sword levelled against his work-related obligations. This point alone differentiates the "conscientious objector" provisions of the Selective Service acts and this Court's decisions arising thereunder, notably *Gillette v. United States*, *supra*: there the claim of exemption has been raised as a shield, in defense to criminal prosecutions for refusal to submit to induction. To like effect is *Wisconsin v. Yoder*, *supra*, where Amish parents were subjected to criminal prosecution when they withdrew their children from the public schools.

The entanglement which can be expected under these provisions has already surfaced in this case. The Kentucky state commission inquired into the Friday-sundown-to-Saturday-sundown practices of the World Wide Church of God (R. 37, 42, 51-52), its holy days (R. 39-40), the length of its Saturday services (R. 40), and the Church's expectations of observance on the part of its membership (R. 38, 45, 47).—all requiring testimony of Cummins' minister. Extensive inquiry was also directed at the *bona fides* of Cummins' professed beliefs—his asserted unwillingness to respond to the repeated suggestions of his plant manager that he substitute for his overworked fellow supervisors (R. 185); his reluctance to take over for an ailing colleague except when pressured by a fellow employee (R. 183-84); and his disinclination to get to work early, even when the men he was supposed to be supervising were required to do so (R. 177). To the extent that facts such as these give rise to questions about the *bona fides* of an employee's claim to preferred treatment, "we must also recognize that 'sincerity' is a concept that can bear only so much adjudicative weight." *Gillette v. United States*, 401 U.S.,

at 457. *Cf. Hansard v. Johns-Manville Prods. Corp.*, 5 E.P.D. ¶8543, at 7561-62 (E.D. Tex. 1973).

Moreover, the affirmative evil engendered by entanglement—"that kind and degree of government involvement in religious life that, as history teaches us, is apt to lead to strife," *Walz v. Tax Commission*, 397 U.S., at 694 (opinion of Harlan, J.)—is demonstrably present on this record. Under compulsion of federal law, a private employer has required supervisory personnel to assume the duties that should have been borne by one of their brethren, who claimed, in effect, a religious exemption from work. The court below dismissed their resentment as mere grumbling; but to the man on the scene, it presented a severe managerial problem. There is no denying that the "religious accommodation" scheme has fostered divisiveness in the industrial plant.¹⁹

¹⁹ We recognize that in the view of Mr. Justice Brennan, the Establishment Clause forbids

"... those involvements of religious with secular institutions which (a) serve the essentially religious activities of religious institutions; (b) employ the organs of government for essentially religious purposes; or (c) use essentially religious means to serve governmental ends, where secular means would suffice." *Lemon v. Kurtzman*, 403 U.S., at 643 (separate opinion); *Walz v. Tax Commission*, 397 U.S., at 680-81 (concurring); *Abington School Dist. v. Schempp*, 374 U.S., at 295 (concurring).

For the reasons set forth at length above, the "religious accommodation" provisions violate each element of this three-part test as well. *First*, the effect and purpose of this scheme conjoin to serve an essentially religious end, particularly of those religious institutions which observe the Sabbath other than on Sunday; indeed, no other explanation is rationally present. *Second*, the force of the federal government—through the mediating offices of the EEOC and then through the power of the courts—is brought to bear in support of the religious objectives of the "accommodation" [Footnote continued on next page.]

C. THE "RELIGIOUS ACCOMMODATION" SCHEME IS NOT REQUIRED TO PRESERVE THE FREE EXERCISE RIGHTS OF EMPLOYEES

It is urged that the 1972 amendment and the 1967 guideline can somehow be justified as an implementation of the free exercise of religious belief guaranteed by the First Amendment.²⁰ Entirely apart from the fact that Congress did not enact Title VII to implement the Bill of Rights,²¹ this argument is unavailing.

First, the Constitution does not require the private employer to assure the free exercise of his employees' religions. As Judge Learned Hand put it in *Ottens v. Baltimore & Ohio R.R.*, 205 F.2d 58, 61 (2d Cir. 1953):

"The First Amendment protects one against action by the government . . . but it gives no one the right to insist that in the pursuit of their own interests others must conform their conduct to his own religious necessities. . . . We must accommodate our idiosyncrasies, religious as well as secular, to the compromises necessary in communal life; and we can hope for no reward for the sacrifices this may require beyond our satisfactions from within, or our expectations of a better world."

scheme. Third, the "accommodation" scheme is designed purportedly to curtail religious discrimination in private employment—an end which may be obtained by enforcement of Title VII as originally enacted in 1964.

²⁰ E.g., *Jordan v. North Carolina Nat'l Bank*, 399 F. Supp. 172, 179-80 (W.D.N.C. 1975).

²¹ See, e.g., *Edwards & Kaplan, supra*, pp. 29-30, at 603 & n.25.

For purposes of First Amendment analysis, Parker Seal cannot be equated with a sovereign State or with the Federal Government.²² This point alone differentiates *Sherbert v. Verner*, 374 U.S. 398 (1963), where South Carolina denied unemployment benefits to a Seventh Day Adventist who refused to work on Saturdays. See *Dewey v. Reynolds Metals Co.*, 429 F.2d, at 329.²³

Second, even if a free-exercise interest were present here, Establishment Clause considerations would still prevail. It surely comes as no surprise to find the two provisions in conflict:

"[T]his Court repeatedly has recognized that tension inevitably exists between the Free Exer-

²² Indeed, the requisite "state action" is wanting even where the employer's action is founded upon a federally sanctioned union-shop provision in the collective-bargaining agreement. *Linscott v. Millers Falls Co.*, 440 F. 2d 14, 19-20 (1st Cir.) (Coffin, J., concurring), cert. denied, 404 U.S. 872 (1971).

²³ *Sherbert* is additionally distinguishable in that the South Carolina statutory scheme there at issue affirmatively discriminated against Saturday worship. South Carolina law "expressly save[d] the Sunday worshipper from having to make the kind of choice [between religious belief and employment]" which this Court held violative of *Sherbert's* religious liberty. Under South Carolina law, no employee could be required to work on Sunday "who is conscientiously opposed to Sunday work"; employers were forbidden to take action against employees who invoked their rights under this statute. See 374 U.S., at 406. Here, by contrast, on the occasions that the Berea plant did operate on Sunday, supervisors were required to work even when Sunday was their Sabbath (R. 147, 161). Moreover, the loss of unemployment benefits and consequent "absolute destitution" in *Sherbert* worked a far more severe hardship on the appellant there than does Cummins' obligation to seek out employment that does not require Saturday work—employment which he has found (R. 53, 103). Cf. *Linscott v. Millers Falls Co.*, 440 F.2d, at 18.

cise and the Establishment Clauses . . . and that it may often not be possible to promote the former without offending the latter. As a result of this tension, our cases require the State to maintain an attitude of 'neutrality,' neither 'advancing' nor 'inhibiting' religion." *Committee for Public Educ. v. Nyquist*, 413 U.S., at 788 (citation and footnote omitted).

To the extent a "balancing" is called for to locate the midpoint of neutrality, the "advancement" of religion unlawfully compelled by the "accommodation" scheme surely poses a greater threat to First Amendment values than does any "inhibition" that might theoretically result from abrogation of the statutory scheme. For it must be borne in mind, as Judge Celebrezze noted in dissent below, 516 F.2d, at 559-60 (Pet. 55a), that the original proscription of religious discrimination contained in Title VII will remain in full force if the "religious accommodation" provisions are invalidated. There is thus no occasion to consider whether the values of the First Amendment must be "zealously protected, sometimes even at the expense of other interests of admittedly high social importance," *Wisconsin v. Yoder*, 406 U.S., at 214—those interests remain fully protected.²⁴

²⁴ It merits emphasis that even noneconstitutional interests have often overcome Free Exercise values. Thus, this Court has recognized that the State's interest in the public health and safety outweighs individual objections founded upon claims to religious liberty. Such interests embrace not only the inoculation of children against disease, *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), and the regulation of their labor, *Prince v. Massachusetts*, 321 U.S. 158 (1944), but also the State's insistence upon monogamous marital relations, *Davis v. Beason*, 133 U.S. 333 (1890); *Reynolds v. United States*, 98 U.S. 145 (1878), or compulsory "military science" courses, *Hamilton v. Regents of Univ. of California*, 293 U.S. 245 [Footnote continued on next page.]

II. The Court of Appeals Misconstrued the Statute and Guideline in Concluding That Parker Seal Did Not Satisfy Its Obligation To Attempt an Accommodation with Cummins

For over a year, Parker Seal went to exceptional lengths to meet the demands occasioned by Cummins' professed religious beliefs. Even without regard to the constitutional issues in this case, Parker Seal's efforts surely satisfied its obligations under any reasonable reading of the "religious accommodation" provisions of Title VII.²⁵ The decision of the court of appeals to the contrary was based largely on its use of those efforts *against* Parker Seal, as evidence that continued accommodation could not have caused the company undue hardship. The court below compounded its error by placing on Parker Seal a burden that was entirely unreasonable, especially when viewed in light of the relevant constitutional considerations.²⁶

(1934). In sum, ever "[s]ince the *Reynolds* case it has been recognized that religious practices are subject to reasonable government interference under certain conditions and circumstances." *Dawson v. Mizell*, 325 F. Supp. 511, 514 (E.D. Va. 1971) (Merhige, J.) (emphasis supplied). No less should be true of legitimate, uniformly applied work rules adopted by private employers.

²⁵ We advance the following analysis without prejudice to Parker Seal's contention that, however construed, the "accommodation" scheme cannot pass muster under the Establishment Clause—a contention addressed in Part I of this brief. Indeed, given this Court's past decisions which interpret that Clause, we are not confident that any construction of the statute which leaves a burden upon the employer to accommodate his employees' religious needs (as opposed to an obligation not to discriminate against them on the basis of their religion) can survive constitutional scrutiny.

²⁶ Undoubtedly, the court of appeals should have attempted to construe the "accommodation" scheme so as to avoid the constitutional questions now presented. *United States v. Seeger*, 380 U.S. [Footnote continued on next page.]

A. THE COURT OF APPEALS ERRED IN TAXING PARKER SEAL FOR ITS PAST EFFORTS AT ACCOMMODATION

It may be that the employer who fails to attempt *any* accommodation may be faulted for his unwillingness to make an effort—whether it be “temporary” (even in the face of doubtful permanent success), *Claybaugh v. Pac. Northwest Bell Tel. Co.*, 355 F. Supp. 1, 6 (D. Ore. 1973), just an “experiment,” *Draper v. United States Pipe & Foundry Co.*, 527 F.2d 515, 120 (6th Cir. 1975), or on a “trial basis,” *Reid v. Memphis Pub. Co.*, 521 F.2d 512, 517 (6th Cir. 1975), *cert. pending*, No. 75-1105. Thus, the employer should be “on stronger ground when he has attempted various methods of accommodation and can point to hardships that actually resulted.” *Draper v. United States Pipe & Foundry Co.*, *supra*.

That is precisely what Parker Seal did here, to no avail—indeed, as it turned out, to the detriment of its subsequent position in court. A trial effort of more than one year, undertaken in good faith by the company, demonstrated that yielding to Cummins’ personal dictates left the Berea Banbury or its adjoining department undermanned one day out of six for each week that the Banbury ran on Saturdays. At the very least, the court of appeals should not have flung in Parker Seal’s face the evidence of its past efforts at accommodation as proof of the insubstantiality of its claim under the “accommodation” scheme.

Parker Seal accommodated Cummins for more than a year after he first announced that he would no

163, 188 (1965) (Douglas, J., concurring); *United States v. Rumlly*, 345 U.S. 41, 47 (1953); *Ashwander v. TVA*, 297 U.S. 288, 341, 348 (1936) (Brandeis, J., concurring).

longer work on Saturdays. He was excused from Saturday work; alternative, makeshift arrangements were made for the necessary supervision of the Banbury. Eventually, however, in view of the “economic . . . and supervisory . . . problems” faced by the plant (R. 173), the manager concluded that Cummins “had to be there [on Saturdays] if that department was to function the way it should” (R. 180). Circumstances at the Berea plant had changed from the time Parker Seal initially accommodated Cummins to the time of his discharge.²⁷ As a result of deteriorating morale and decreasing output, the plant manager who had approved Cummins’ absence was replaced, and a successor was brought in to attempt to resolve the “economic . . . and supervisory . . . problems” (R. 173). The new manager told Cummins that “as long as it don’t cause any problems,” he had no objection to Cummins’ Saturday absences (R. 69). But by the summer of 1971, he had concluded that working on scheduled Saturdays was as essential a part of the Banbury first shift supervisor’s job as it was that of the men working in the Banbury on that day (R. 180).

The court of appeals turned this evidence of attempted accommodation against Parker Seal. The

²⁷ Cummins’ attitude towards the problem also appears to have changed. When he first informed the plant manager that he would not work on Saturdays, he said he would be willing to help out by working extra hours at any other time (R. 65, 115-16). Later, however, according to the new plant manager, he “made no effort to go down and relieve those other fellows during the week who had to relieve him on Saturdays” (R. 202). The problem was further aggravated by Cummins’ refusal to work the same hours during the week as the shift he was supervising, despite company policy to that effect (R. 158, 177).

court rested its decision largely on its professed inability to understand "why an accommodation that was reasonable for over a year . . . suddenly became unreasonable in September 1971." 516 F.2d, at 547 (Pet. 20a). In other words, having once embarked on a good faith effort to determine whether Cummins' supervisory duties could be adequately discharged without his doing the Saturday work required of other employees, Parker Seal could never thereafter assert that its efforts ultimately caused it "undue hardship."

The court of appeals' decision places the employer in an intolerable position. If he refuses to make any effort to accommodate his Sabbatarian employees, he risks liability without more under the statute and guideline. But if, like Parker Seal, he makes an attempt at accommodation which later proves unworkable, the attempt itself may be used against him, as evidence that his claim of "undue hardship" is unfounded. Such a result surely was not intended by the EEOC when it promulgated either version of Guideline 1605.1, nor by Congress when it passed the 1972 amendment to Title VII. By discouraging employers from attempting to work out problems arising from employees' religious convictions, the decision below frustrates the entire purpose of the "religious accommodation" rule. On this ground alone, the judgment of the court of appeals should be reversed.

B. THE RECORD AMPLY SUPPORTS THE CONCLUSION OF THE DISTRICT COURT THAT PARKER SEAL SATISFIED ITS STATUTORY OBLIGATIONS

A number of factors emerge from the decisions of the lower courts which clarify the proper scope of the

employer's obligation under Title VII to accommodate his religiously motivated employees. Whether taken singly or in combination, those elements all support Parker Seal's position on this record, especially in light of the narrow reading which must be accorded the statute given the serious Establishment Clause issues.²⁸

—Whether the Complaining Employee Has Attempted Any Accommodation

"Accommodation" connotes a mutuality of effort. The burden of accommodation should not be unilaterally imposed upon the employer; the employee, too, must shoulder some obligations in this regard. Title VII should not be read to "require an employer to impose hardships on its [other] employees, or to bear the financial burden of an employee's religious convictions," especially where the employee seeking preferred treatment has taken an "intransigent position" or has refused to pursue any available avenue of relief within the employer's established system. *United States v. City of Albuquerque*, 9 E.P.D. ¶10,182, at 7825, 7830 (C.D. Cal. 1975). Thus, the employee who wishes to avoid compulsory overtime on his Sabbath should be willing to find a substitute worker, at least where permitted by his union's collective bargaining agreement. *Cf. Dewey v. Reynolds Metals Co.*, 429 F.2d 324 (6th Cir. 1970), *aff'd by equally divided Court*, 402 U.S. 689 (1971); *Riley v. Bendix Corp.*,

²⁸ As noted above (p. 18, n.10), because the "religious accommodation" provisions add to the obligations already fashioned by the prohibition against discrimination found in the original Title VII, a narrow interpretation of the provisions here at issue will not affect the fundamental statutory ban on discrimination.

330 F. Supp. 583, 585 (M.D. Fla. 1971), *rev'd*, 464 F.2d 1113, 1115 (5th Cir. 1972).²⁹

Here, Cummins made no effort whatever to ease the difficulties his professed religious views were causing Parker Seal; according to the testimony of his plant manager, he ignored repeated suggestions that he substitute during the week for his over-worked fellow supervisors who were covering his job on Saturdays.

The court of appeals proposed that Parker Seal might have reduced Cummins' salary commensurately with his shorter hours. 516 F.2d, at 550 (Pet. 29a). However, the court did not explain how that step would have reduced the burden on Cummins' fellow supervisors (who would still have been required to substitute for him on Saturdays), nor how it would have improved the efficiency of the Banbury department. Moreover, Cummins never offered to take a pay cut (R. 101). It is accordingly unclear why such a reduction in pay would not have been subject to a subsequent challenge by Cummins based upon the statutory prohibition against discrimination in compensation. Section 703(a)(1), 42 U.S.C. § 2000e-2(a)(1).

*—Whether the Job Requires an Unusual Degree
of Specialization or Flexibility*

An employer surely is entitled to consideration where the job at issue calls for "specialists . . . not

²⁹ See also *Williams v. Southern Union Gas Co.*, 529 F.2d 483, 488 (10th Cir. 1976) (sufficient advance notice of intended absence required to enable employer to make suitable alternative arrangements), *cert. pending*, No. 75-1511.

readily interchangeable," and where the employer thus faces difficulty in finding available substitutes. *Reid v. Memphis Pub. Co.*, 521 F.2d, at 515 (newspaper copy editors); *cf. Dixon v. Omaha Public Power Dist.*, 385 F. Supp. 1382, 1386 (D. Neb. 1974) (electric-line maintenance and repair).

Similarly, the job position at issue may call for "truly a flexible employee, available whenever needed." *Johnson v. United States Postal Service*, 497 F.2d 128, 130 (5th Cir. 1974), *aff'g* 364 F. Supp. 37 (N.D. Fla. 1973) (part-time mail clerk covering other employees on vacation, leave, or out sick). Or, as here, it may involve a foreman—an "essential employee" as to whom "it is not difficult to understand how leaving [the] . . . job in the middle of the shift would have its effect upon the work. . . ." *Riley v. Bendix Corp.*, 330 F. Supp., at 590, *rev'd*, 464 F.2d 1113 (5th Cir. 1972). The EEOC similarly has recognized that the absence of employees who occupy key positions in the business operation may result in severe economic hardship to the employer. EEOC Dec. No. 70-773, CCH EEOC Dec. ¶ 6154 (1970).

As a plant supervisor, Cummins had substantial responsibility for the operation of a department and the men working under him (R. 56, 205). He was deemed a "part of management" (R. 79). The nature of his responsibilities, like those of his fellow supervisors, required his presence whenever his men were on the job—a point of sufficient importance that the new plant manager put out a memorandum restating company policy on this subject when he arrived in Berea (R. 158).

—*Whether the Nature of the Employer's Business Limits the Opportunity for Alternative Avenues of Accommodation*

The courts should consider whether the employer's operations permit the adjustment needed to meet the religious needs of individual employees. Employers such as Parker Seal which operate "job type" plants, producing on order to customer specifications, must schedule production to meet stipulated delivery dates. *Cf. Dewey v. Reynolds Metals Co.*, 429 F.2d, at 328. In such circumstances, there may well be less room for play at the joints.

Cummins' position with Parker Seal required his availability in response to customer orders, which had to be met on a short lead-time (R. 100, 220). That necessary responsiveness on the part of the Berea operation as a whole often required operation of Cummins' department on Saturdays, as Cummins knew (R. 231). Parker Seal was surely entitled to take these facts into consideration in responding to Cummins' demand for regular Saturday absences.

—*Whether a Pool of Fellow Employees Is Readily Available To Serve as Substitute Workers*

The employer with large numbers of similarly situated employees may have less cause to object to an obligation to accommodate than one whose labor pool provides fewer substitutes. Thus, a telephone company with 150 toll transmission men statewide was said to have erred in failing to seek out a transfer for a line-man willing to relocate to a position where his religious needs could be accommodated. *Claybaugh v. Pac. Northwest Bell Tel. Co.*, 355 F. Supp., at 5. See

also *Hardison v. Trans World Airlines, Inc.*, 527 F.2d 33, 39 (8th Cir. 1975), *rev'g* 375 F. Supp. 877 (W.D. Mo. 1974), *cert. pending*, No. 75-1126, 75-1385 (200 employees said to be able to perform work in question). Conversely, "in very small offices and enterprises . . . the shifting of one employee . . . may cause very real hardship to an employer." *Shaffield v. Northrop Worldwide Aircraft Services, Inc.*, 373 F. Supp. 937, 941 (M.D. Ala. 1974) (dictum); *cf. Johnson v. United States Postal Service*, 364 F. Supp., at 42. And even the large employer should be able to point out that the aggrieved employee is "the only person performing his particular job on his shift during the weekend" in a continuously operating department which supplies parts company-wide. *Hardison v. Trans World Airlines, Inc.*, 375 F. Supp., at 891, *rev'd*, 527 F.2d, at 39; *cf. Johnson v. United States Postal Service*, 497 F.2d, at 129-30; *Roberts v. Hermitage Cotton Mills*, 8 E.P.D. ¶9589, at 5552 (D.S.C.), *aff'd*, 8 E.P.D. ¶9597 (4th Cir. 1974); *Drum v. Ware*, 7 E.P.D. ¶9244, at 7162 (W.D.N.C. 1974) (local post office had only six regular letter carriers; plaintiff agreed to transfer to Charlotte area, where Postal Service employed 1500 people).

Here, Parker Seal's Berea operation employed some 600 people (R. 132). Only 17 of those were supervisors at Cummins' level of employment (R. 186). The Berea plant manager either required one of them to substitute for Cummins on each Saturday the Banbury department was in operation, or directed the Stock Prep Supervisor to double up on his Saturday responsibilities. Although the court below thought that Parker Seal could have required Cummins to substitute for his colleagues during the week, 516 F.2d, at

550 (Pet. 20a-30a), this would have been impossible under normal working conditions to the extent that substitute supervisors were already working on the same shift as Cummins (R. 198). Moreover, the issuance of orders at this level was contrary to the plant manager's overriding objective of inculcating a sense of participatory responsibility among his supervisory staff (R. 183-86).

—*Whether Replacement Is Sought on a Regular or Infrequent Basis*

It is one thing for an employee to seek relief once a month to attend religious meetings. *Weitkenaut v. Goodyear Tire & Rubber Co.*, 381 F. Supp. 1284, 1286 (D. Vt. 1974). It is something else again when the employee demands relief from all work assignments once every week, from sundown on Friday to sundown on Saturday. In a six-day-a-week plant, that demand can cut across a number of working shifts. The weekly disruption of supervision in the Banbury department occasioned by Cummins' Saturday absences amounted to more than the occasional employee request for time off in support of a special religious holiday.

—*Whether Accommodation Will Result in Lost Efficiency and Other Costs to the Employer*

The employer must be heard to raise the objection that satisfaction of the aggrieved employee's religious demands will require the juggling of work schedules, the imposition of extra time upon other employees, or the incurrence of overtime expense. *Cf. United States v. City of Albuquerque*, 9 E.P.D., at 7830; *Dixon v. Omaha Pub. Power Dist.*, 385 F. Supp., at 1386. *But cf. Ward v. Allegheny Ludlum Steel Corp.*, 397 F.

Supp. 375, 377 (W.D. Pa. 1975), *appeal pending* (3d Cir.).³⁰ Moreover, even if employee "grumbling" alone does not suffice to bar accommodation, *see Draper v. United States Pipe & Foundry Co.*, 527 F.2d, at 520; *Cummins v. Parker Seal Co.*, 516 F.2d, at 550 (App. 29a), it is difficult to accept the view of the court below that personnel problems must reach the level of "chaos" before they may legitimately be taken into account. The employer surely must be entitled to take into account "a serious morale problem" short of plant disruption. *Reid v. Memphis Pub. Co.*, 521 F.2d, at 516.

Here, three members of Parker Seal's management testified that Cummins' absence on Saturdays adversely affected the operations of his department (R. 131, 180, 228). Even the plant manager who had first approved Cummins' absence on Saturdays believed that oversight of the Banbury department's first shift by the supervisor of the neighboring department was "absolutely not" good operating procedure, and that the situation could not be allowed to continue indefinitely (R. 124-25, 129). In the opinion of that manager's successor, Cummins simply "had to be there [on Saturdays] if that department was to function the way it should" (R. 180).

In alleviation of the foregoing burdens upon Parker Seal, the court below suggested that Cummins might have been required to work on Sundays instead of Saturdays. 516 F.2d, at 550 (Pet. 29a). But because of the doubletime rates provided in the union contract, the Banbury rarely operated on Sundays; when-

³⁰ The safe operation of the business is also a relevant consideration. *Draper v. United States Pipe & Foundry Co.*, 527 F.2d, at 521.

ever it did, Cummins was already there (R. 63, 109, 135, 198). It is difficult to see what benefit either the company or Cummins would have derived from his supervision of a deserted department on the Sundays that the plant did not operate.

—*Whether the Employer's Financial Condition and Prospects Can Sustain Additional Burdens*

Other courts have not overlooked the "strict manning and budgetary limits" under which an employer may have to operate. *United States v. City of Albuquerque*, 9 E.P.D., at 7830 (city fire department). The court below improperly ignored that factor here. Although its opinion was silent on the subject, the record before the Kentucky Commission and the district court reflected the undisputed testimony that the profitability of the Berea operation had deteriorated so seriously in recent years that a new plant manager had been brought in with a view either to straightening out the operation or to closing it down (R. 173). Already, large numbers of employees had been let go (R. 208). In particular, the Banbury operation was a source of continuing concern, with productivity little more than half that of a comparably situated nearby plant (R. 131, 175, 218-19). The new manager was operating under directives to improve performance—specifically, to "solicit and to . . . insist" not only on "longer hours," but also "more personal interest [and] more involvement on the part of the Supervision" as well (R. 210). This was the context in which the Berea plant manager finally determined that he could no longer afford the added operating burdens in the Banbury department and on his supervisory staff which were created by Cummins' continual absences.

—*Whether the Hardship Will Fall on Fellow Employees*

Even if the employer has a duty to inquire whether other employees are willing to exchange shifts with the aggrieved religionist, *e.g.*, *Claybaugh v. Pac. Northwest Bell Tel. Co.*, 355 F. Supp., at 5, there remains a serious question whether he must compel such employees to accept added burdens. Several courts have refused to sanction such forced accommodation at other employees' expense. *E.g.*, *Williams v. Southern Union Gas Co.*, 529 F.2d, at 489 (supervisor forced to delay vacation); *Reid v. Memphis Pub. Co.*, 521 F.2d, at 516 (senior copyreaders would have had to come in on Saturdays); *Kettell v. Johnson & Johnson*, 337 F. Supp. 892, 894 (E.D. Ark. 1972); *United States v. City of Albuquerque*, 9 E.P.D., at 7830; *Drum v. Ware*, 7 E.P.D. ¶ 9244, at 7162 (continued requirement of Saturday substitution for full-time letter carrier worked undue hardship).

For over a year, Parker Seal required Cummins' fellow supervisors to cover his department, at no increase in pay to them, and even though there came a time when they were bearing a workload nearly twice that of Cummins (R. 140, 146, 150, 156, 176). Only when the other supervisors took the extraordinary step of complaining to the plant manager did he urge Cummins to reconsider his position (R. 71, 175). In response to this history of accommodation by Parker Seal and its supervisory staff to Cummins' religious dictates, the court below lightly—and, we submit, improperly—dismissed the complaints of Cummins' fellow workers as mere employee grumbling. 516 F.2d, at 510 (Pet. 28a-29a).

—*Whether the Employer's Obligations to Third Parties Permit the Demanded Accommodation*

Often an employer's freedom of action in seeking to accommodate an employee's religious views is circumscribed by his pre-existing agreements with others—most notably, a collective bargaining agreement with the union. *Cf. Shaffield v. Northrop Worldwide Aircraft Services, Inc.*, 373 F. Supp., at 942. The courts have left it unclear whether under the "accommodation" scheme the employer need do more than consult with the union representative with a view to seeking a voluntary waiver of pertinent provisions. *Hardison v. Trans World Airlines, Inc.*, 527 F.2d, at 41-42; *Shaffield v. Northrop Worldwide Aircraft Services, Inc.*, 373 F. Supp., at 942; *Claybaugh v. Pac. Northwest Bell Tel. Co.*, 355 F. Supp., at 6; *Dawson v. Mizell*, 325 F. Supp. 511, 513 (E.D. Va. 1971). Some courts have rejected the notion that the employer must go further, and somehow override or ignore the agreement at the behest of the religiously motivated individual employee. *Hardison v. Trans World Airlines, Inc.*, 527 F. 2d, at 43 (question reserved); *Reid v. Memphis Pub. Co.*, 521 F.2d, at 516; *Johnson v. United States Postal Service*, 497 F.2d, at 129 (no duty to override); *Dawson v. Mizell*, 325 F. Supp., at 513-14 (no duty on part of Postal Service to violate agreement governing 700,000 workers).

In this case, a collective bargaining agreement with the union precluded Parker Seal from demoting Cummins to a lower level in the work force from his supervisory position (*see* R. 72, 99). Further, even though Cummins' fellow supervisors, like Cummins himself, were not covered by the terms of that agree-

ment, Parker Seal surely had obligations to them as well—notably, an obligation not to impose upon them burdens of supervisory responsibility far beyond those which Cummins was willing to accept.

* * *

In sum, Parker Seal complied with its statutory obligations. Whether the test be one of the "undue" character of the burden Parker Seal would otherwise have had to bear, or the "reasonableness" of its attempts at accommodation, the outcome is the same—Parker Seal strove abundantly to meet Cummins' religious demands. Indeed, short of an abdication of responsibility for the operation and profitability of a marginal industrial plant, Parker Seal's Berea manager could hardly have attempted more to alleviate the burdens under which Cummins professed to labor. Thus, especially when viewed in the light of the constitutional considerations addressed in the first section of this brief, Parker Seal must be said to have satisfied its obligations to Cummins under Title VII.

CONCLUSION

For the foregoing reasons, Parker Seal Company, the petitioner, respectfully submits that this Court should reverse the judgment of the court of appeals below, and should remand with instructions to reinstate the judgment of the district court dismissing Cummins' complaint.

Respectfully submitted,

PATRICK F. J. MACRORY

LEONARD H. BECKER

PAUL S. RYERSON

1229 Nineteenth Street, N.W.

Washington, D. C. 20036

—and—

BENNETT CLARK

1000 First Security Plaza

Lexington, Kentucky 40507

Attorneys for Petitioner

Parker Seal Company

Of Counsel:

ARNOLD & PORTER

1229 Nineteenth Street, N.W.

Washington, D.C. 20036

STOLL, KEENON & PARK

1000 First Security Plaza

Lexington, Kentucky 40507

May 15, 1976

Supreme Court, U. S.

FILED

JUL 20 1975

MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-478

PARKER SEAL COMPANY, Petitioner

versus

PAUL CUMMINS, Respondent

On Writ of Certiorari to the United States Court of Appeals
for the Sixth Circuit

BRIEF FOR RESPONDENT

THOMAS L. HOGAN
701 West Walnut
Louisville, Kentucky 40202

and

JAMES C. HICKEY
EWEN, MacKENZIE & PEDEN, P.S.C.
2100 Commonwealth Building
Louisville, Kentucky 40202

*Attorneys for Respondent, Paul
Cummins*

TABLE OF CONTENTS

	PAGE
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISIONS, STATUTES, AND GUIDELINE INVOLVED	2- 3
QUESTIONS PRESENTED	4
COUNTERSTATEMENT OF THE CASE	4- 7
PROCEEDINGS BELOW	7- 8
ARGUMENT	8-31
SUMMARY	8- 9
I. The 1972 "Religious Accommodation" Amendment and E.E.O.C's 1967 Guideline do Not Violate the Establishment Clause of the First Amendment..	9-26
A. The Background of Section 701(j) of the Civil Rights Act	10-13
B. The Religious Accommodation provision ren- ders "religion" a neutral factor in employ- ment.	13-14
C. The 1972 Amendment and 1967 Guidelines meet this Court's Tripartite Establishment Clause Test.	14-26
1. Purpose	16-18
2. Effect	18-23
3. Entanglement	23-26
II. The Court of Appeals Correctly Held That Parker Seal Did Not Meet Its Burden of Showing That They Were Unable to 'Reasonably Accommodate' Cummins Without Undue Hardship	26-31
CONCLUSION	32

TABLE OF AUTHORITIES

Cases:	PAGE
<i>Abington School District v. Schempp</i> , 374 U. S. 203 (1963).....	19, 25
<i>Board of Education v. Allen</i> , 392 U. S. 236 (1968) ..	15, 20
<i>Bowe v. Colgate-Palmolive Company</i> , 416 F. 2d 711 (7th Cir. 1969).....	30
<i>Braunfield v. Brown</i> , 366 U. S. 599 (1961).....	16, 25
<i>Cheatwood v. South Central Bell Telephone & Telegraph Company</i> , 303 F. Supp. 754 (D.C. Ala. 1969).....	30
<i>Committee for Public Education v. Nyquist</i> , 413 U. S. 756 (1973).....	16, 19, 23
<i>Cummins v. Parker Seal Company</i> , 516 F. 2d 544 (1975).....	8, 21, 24, 25, 26-27, 28
<i>Dewey v. Reynolds Metals Company</i> , 429 F. 2d 324 (6th Cir. 1970), affirmed by equally divided court, 402 U. S. 689 (1971).....	11, 12-13
<i>Dixon v. Omaha Public Power District</i> , 385 F. Supp. 1382 (D. Neb. 1974).....	27
<i>Draper v. United States Pipe & Foundry Company</i> , 527 F. 2d 515 (6th Cir. 1975).....	27
<i>Engel v. Vitale</i> , 370 U. S. 421 (1962).....	14, 21
<i>Epperson v. Arkansas</i> , 393 U. S. 97 (1968).....	19
<i>Everson v. Board of Education</i> , 330 U. S. 1 (1947) ..	15, 20
<i>Follett v. McCormick</i> , 321 U. S. 573 (1944).....	17
<i>Gallagher v. Crown Kosher Super Market</i> , 366 U. S. 617 (1961).....	20-21
<i>Gillette v. United States</i> , 401 U. S. 437 (1971).....	24
<i>Griggs v. Duke Power Company</i> , 401 U. S. 424 (1971).....	11-12, 14, 17, 30
<i>Hardison v. Trans World Airlines, Inc.</i> , 375 F. Supp. 877 (W.D. Mo. 1974), rev'd on other grounds, 527 F. 2d 33 (8th Cir. 1975), cert. pending, No. 75-1126.	24, 27-28
<i>Hunt v. McNair</i> , 413 U. S. 734 (1973).....	23

Cases: (Cont'd)

	PAGE
<i>Jones v. Lee Way Motor Freight, Inc.</i> , 431 F. 2d 245 (10th Cir. 1970).....	30
<i>Jones v. Mayer</i> , 392 U. S. 409 (1968).....	22
<i>Jones v. Opelika</i> , 319 U. S. 103 (1943).....	16
<i>Lemon v. Kurtzman</i> , 403 U. S. 602 (1971).....	16, 19, 23, 25
<i>Local 189, United Papermakers & Paperworkers v. United States</i> , 416 F. 2d 980 (5th Cir. 1969), cert. denied, 397 U. S. 919 (1970).....	30
<i>Martin v. Struthers</i> , 319 U. S. 141 (1943).....	16-17
<i>McCollum v. Board of Education</i> , 333 U. S. 202 (1948).....	19
<i>McGowan v. Maryland</i> , 366 U. S. 420 (1961).....	20, 21
<i>Meek v. Pittenger</i> , 421 U. S. 349 (1975).....	16
<i>Murdock v. Pennsylvania</i> , 319 U. S. 105 (1943).....	14, 16
<i>Prince v. Massachusetts</i> , 321 U. S. 158 (1944).....	25
<i>Reid v. Memphis Pub. Co.</i> , 521 F. 2d 512 (6th Cir. 1975), cert. pending, No. 75-1105.....	14
<i>Reynolds v. United States</i> , 98 U. S. 195 (1878).....	25
<i>Robinson v. Lorillard</i> , 444 F. 2d 791 (1971).....	12, 30
<i>Roemer v. Board of Public Works of Maryland</i> , — U. S. —, 44 L.W. 4939 (1976).....	16, 19, 23
<i>Runyan v. McCray</i> , — U. S. —, 44 L. W. 5034 (1976).....	22
<i>Sherbert v. Verner</i> , 374 U. S. 398 (1963).....	13-14, 17, 20, 22, 24
<i>Tillman v. Wheaton-Haven Recreation Assn.</i> , 410 U. S. 431 (1973).....	22
<i>Tilton v. Richardson</i> , 403 U. S. 672 (1971).....	15, 16, 19, 23
<i>Truax v. Raich</i> , 239 U. S. 33 (1915).....	17-18
<i>Two Guys from Harrison-Allentown, Inc. v. McGinley</i> , 366 U. S. 582 (1961).....	21
<i>United States v. Bethlehem Steel Corporation</i> , 446 F. 2d 652 (2d Cir. 1971).....	12
<i>United States v. City of Albuquerque</i> , 9 E.P.D. ¶ 10, 182 (C.D. Cal. 1975).....	27, 28

Cases: (Cont'd)

	PAGE
<i>United States v. International Brotherhood of Electrical Workers, Local 38</i> , 428 F. 2d 144 (6th Cir. 1970), <i>cert. denied</i> , 400 U. S. 943 (1970)	30
<i>Walz v. Tax Commission</i> , 397 U. S. 664 (1970)	14, 19, 24
<i>Ward v. Allegheny Ludlum Steel Corporation</i> , 397 F. Supp. 375 (W.D. Pa. 1975), <i>appeal pending</i> (3d Cir.)	27
<i>Weeks v. Southern Bell Telephone & Telegraph Company</i> , 408 F. 2d 228 (5th Cir. 1969)	30
<i>Weitzenaut v. Goodyear Tire & Rubber Company</i> , 381 F. Supp. 1284 (D. Vt. 1974)	27
<i>Welsh v. United States</i> , 398 U. S. 333 (1970)	23
<i>Williams v. Southern Union Gas Company</i> , 529 F. 2d 483 (10th Cir. 1976), <i>cert. pending</i> , No. 75-1511.	14
<i>Wisconsin v. Yoder</i> , 406 U. S. 205 (1972)	13, 22, 24
<i>Young v. Southwestern Savings & Loan Association</i> , 509 F. 2d 140 (5th Cir. 1975)	19, 24
<i>Zorach v. Clauson</i> , 343 U. S. 306 (1952)	15, 20, 25

Constitution and Statutes:

U. S. Constitution, First Amendment	Passim
28 U.S.C. § 1254(1)	2
26 U.S.C. § 1402(h)	22
42 U.S.C. §§ 1981, 1982	23
42 U.S.C. §§ 2000e	Passim
(2) (a) (1)	2
(j)	2, 12, 14

Regulations:

29 C.F.R. § 1605.1 (1975)	2-3, 11
31 Fed. Reg. 8370 (1966)	10

Congressional Materials:

118 Cong. Rec. 706-13 (1972)	13
--	----

Other:

	PAGE
Edward G. Kaplan, "Religious Discrimination and the Role of Arbitration Under Title VII," 69 Mich. L. Rev. 599 (1971)	10

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-478

PARKER SEAL COMPANY, - - - *Petitioner*

v.

PAUL CUMMINS, - - - - - *Respondent*

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. 13a) is reported at 516 F. 2d 544. The opinion of the District Court (Pet. 7a) is unreported. The opinion of the Kentucky Commission on Human Rights (Pet. 1a) is unreported.¹

JURISDICTION

Judgment was entered by the Sixth Circuit Court of Appeals on May 23, 1975 (Pet. 59a). Petition for Rehearing was denied July 18, 1975 (Pet. 61a). Peti-

¹"Pet" refers to Parker Seal's petition for certiorari. "R" refers to the single appendix filed herewith.

tion for certiorari was filed September 25, 1975 and granted on March 1, 1976 (R. 246). Jurisdiction of this Court rests upon 28 U.S.C. §1254(1).

**Constitutional Provisions, Statutes and
Guideline Involved**

The First Amendment provides:

“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . .”

Section 703(a)(1) of the Civil Rights Act of 1964, as amended, provides:

“It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . .” 42 U.S.C. §2000e-2(a)(1) (1974).

Section 701(j) of the Civil Rights Act of 1964, as amended, provides:

“The term ‘religion’ includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.” 42 U.S.C. §2000e(j) (1974).

Guideline 1605.1 of the United States Equal Employment Opportunity Commission provides:

“(a) Several complaints filed with the Commission have raised the question whether it is discrimination on account of religion to discharge or refuse to hire employees who regularly observe Friday evening and Saturday, or some other day of the week, as the Sabbath or who observe certain special religious holidays during the year and, as a consequence, do not work on such days.

“(b) The Commission believes that the duty not to discriminate on religious grounds required by Section 703(a)(1) of the Civil Rights Act of 1964, includes an obligation on the part of the employer to make reasonable accommodations to the religious needs of employees and prospective employees where such accommodations can be made without undue hardship on the conduct of the employer's business. Such undue hardship, for example, may exist where the employee's needed work cannot be performed by another employee of substantially similar qualifications during the period of absence of the Sabbath observer.

“(c) Because of the particularly sensitive nature of discharging or refusing to hire an employee or applicant on account of his religious beliefs, the employer has the burden of proving that an undue hardship renders the required accommodations to the religious needs of the employee unreasonable.

“(d) the Commission will review each case on an individual basis in an effort to seek an equitable application of these guidelines to the varied religious practices of the American people.” 29 C.F.R. §1605.1 (1975).

QUESTIONS PRESENTED

Title VII of the 1964 Civil Rights Act, as amended, and the E.E.O.C.'s "religious accommodation" guidelines promulgated thereunder, require an employer to "reasonably accommodate" the religious beliefs of an employee unless such accommodation would impose an "undue hardship" on employers' business.

1. Whether the 1972 "Religious Accommodation" Amendment and EEOC 1967 Guideline violate the Establishment Clause of the Constitution.

2. Whether the Court of Appeals correctly held that the employer did not meet its burden of showing that it was unable to reasonably accommodate the employee without undue hardship.

COUNTER STATEMENT OF THE CASE

Paul Cummins was employed by the Parker Seal Company at its Berea, Kentucky, plant on December 9, 1958 (R. 53). In May of 1965 he was promoted to supervisor of the Banbury (rubber mixing) department and continued in that salaried management (non union) classification until he was fired by Parker Seal on September 3, 1971 (R. 55-56). His regular work shift was the first shift, *i.e.*, from 7:00 A. M. to 3:00 P. M., Monday through Friday, but he was not required to punch a time clock and was expected to be on call if needed (R. 78).

In April 1969, Cummins began to attend the World Wide Church of God with his family and became a member of that church in September 1970 (R. 61).

The World Wide Church of God observes the period from sunset Friday to sunset Saturday as the Sabbath and its members honor this period by abstaining from their regular labors and by attending religious services. Certain designated "Feast days of God" which occur throughout the calendar year are also observed in the same fashion.

When Cummins began observing the Sabbath in July 1970, he advised the Parker Seal plant manager, Conley Saylor, that he could not work on the Sabbath or annual holy day, but he would work at any other time (R. 64-65). From that time forward Cummins did not work on Saturdays.

Actually, Saturday work was overtime (time and a half) for hourly workers and was only scheduled when necessary, which was perhaps one-half of the Saturdays in 1971 (R. 173).

The new plant manager who replaced Conley Saylor in November 1970, L. G. "Dutch" Haddock, was not aware that Cummins was not working on Saturday until the summer of 1971. He did not discuss the matter with Cummins until July or August 1971 when the heavy vacation schedule in the Stock Prep Department caused Cummins' Saturday absence to become a problem and to be brought to his attention (R. 173-175).

Haddock's superior, Roy Kuhn, took a special interest in the Berea plant beginning in October 1970 and spent a whole month in the plant covering all three shifts in December 1970 (R. 210) but did not learn that the Banbury supervisor (Cummins) was

not working on Saturday until he was advised by Haddock in July or August 1971 (R. 231-232).

The reason that Haddock replaced Saylor and Kuhn took such an interest in the operation of the Berea plant was that the profitability of the Berea plant declined steadily beginning in 1968 and through early 1970 (R. 207). One of the reasons for this decline was the general economic picture in our whole economy (R. 209). This was during the time that Cummins was working Saturdays and holy days, before he became a member of the Church, and before he excluded himself from the possibility of work from sundown Friday to sundown on Saturday. In spite of Parker Seal's protestation and implications to the contrary, the plant manager stated unequivocally that there was "nothing related to Paul's situation" (R. 131). Cummins did a very adequate job (R. 119) and was one of the stronger foremen (R. 222).

Further, it had been company practice for years, for economic reasons to operate a second shift (and sometimes a third shift) at Banbury without a foreman (R. 117-118, 130). This practice has continued well after Cummins was terminated (R. 219-220).

Although Cummins received very little guidance or assistance from his supervisors relating to his new work situation which began in July 1970, Cummins did volunteer to work and did work for other employees (R. 67, 99, 141-142, 153).

The morale problem of which Parker Seal complains did not really begin until the summer of 1971

with vacation scheduling—an obviously temporary situation (R. 175).

The company response to this morale problem created by heavy vacation schedules was to ask Cummins to change his religious ideas (R. 178). Cummins was terminated for refusing to work on his Sabbath (R. 71-72, 179-181).

PROCEEDINGS BELOW

Following his discharge on September 3, 1971, Cummins filed charges of unlawful discrimination with both the Kentucky Commission on Human Rights (KCHR) and the E.E.O.C. (R. 6).

The KCHR conducted a complete evidentiary hearing in Richmond, Kentucky, on March 3, 1972. The complete record of that hearing is contained in the appendix (R. 21-241) and the parties have stipulated that factual record for purposes of the action in Federal Court filed on September 26, 1972 (R. 242-245).

Both the KCHR and the District Court ruled in favor of Parker Seal. The decision of the District Court was conclusionary and stated no facts in support of the conclusion that undue hardship had or would result. The Court of Appeals for the Sixth Circuit felt compelled to carefully review the entire factual record and concluded (1) that mild and infrequent complaints of fellow employees because of Cummins' refusal to work on Saturday do not amount to undue hardship on conduct of employer's business, and (2) Parker Seal

might have alleviated some of the dissension if it had pursued a more active course of accommodation. *Cummins v. Parker Seal Company*, 516 F. 2d 544, 550 (6th Cir. 1975).

In addition to ruling that the factual record did not support the District Court decision, the Court of Appeals held that Section 701(j) of Title VII, 42 U.S.C. §2000e(j), is not inconsistent with the establishment clause of the First Amendment to the Constitution. 516 F. 2d at 554. Judge Celebrezze dissented on the basis of his belief that there is a "wall of separation between Church and State erected by the First Amendment" and that both the statute and the E.E.O.C. Guidelines breach that wall and have effected an establishment of religion. Apparently, Judge Celebrezze conceded that the case could not be decided in favor of Parker Seal on the facts or he would not have felt compelled to reach the constitutional issue. 516 F. 2d at 555.

ARGUMENT

SUMMARY

The "religious accommodation" provisions of Title VII require an employer to show that "undue hardship" results before he is allowed to compel an employee to violate his religious principles. An employer may not apply a rule or condition of employment, though neutral on its face, if said rule or condition, has

the effect of discriminating against an employee because of his religion without a showing of undue hardship.

The "reasonable accommodation" provision meets the tripartite test in that its purpose and effect are secular and it does not foster an excessive entanglement between religion and government.

The Sixth Circuit correctly held that the employer failed in its obligations to "reasonably accommodate" the employee and rather attempted to shift the burden to the employee. The employer forced the employee to choose between his religion and his job. The Court further correctly held mild and infrequent complaints of other employees do not constitute "undue hardship" within the meaning of 42 U.S.C. 2000(e)j (1974).

I. The 1972 "Religious Accommodation" Amendment and E.E.O.C.'s 1967 Guideline do Not Violate the Establishment Clause of the First Amendment.

As will be developed, it is obvious that the "religious accommodation" provisions of Title VII, do not violate the Establishment Clause of the First Amendment but rather fulfill a valid congressional goal—the elimination of discrimination in employment based on religion.

The purpose of the 1972 Amendment was clarification by Congress that a person's religious beliefs and practices should not be a factor in the area of employment.

The amendment is not rigid and is a proper balance between the rights and duties of the employer and the employee.

The "accommodation" provision is the very heart of the ban on religious discrimination.

A. THE BACKGROUND OF SECTION 701(j) OF THE CIVIL RIGHTS ACT.

Congress focused its primary attention on the problem of race discrimination when it considered Title VII of the 1964 Civil Rights Act. There is scant legislative history concerning the inclusion of religious discrimination in the proscribed employment practices, and what can be found is not illuminating.

It seems clear, however, that Congress included religion as a proscribed factor in employment decisions because the fair employment acts of several states, which Congress used as models, typically declared discrimination based on race, color, *religion*, or national origin unlawful. The inclusion reflects a recognition that the exercise of religious freedom in the United States has always been considered a fundamental right which lies at the heart of a free society.³

In 1966 the United States Equal Employment Opportunity Commission issued Guidelines which were intended to give meaning and substance to the proscription of religious discrimination contained in Section 703(a)(1) of Title VII.⁴ After a year's experience

³Edwards & Kaplan, "Religious Discrimination and the Role of Arbitration Under Title VII," 69 *Mich. L. Rev.* 599, 602 (1971).

⁴E.E.O.C. Guidelines on Discrimination Because of Religion, 31 *Fed. Reg.* 8370 (1966).

with these Guidelines, the E.E.O.C. issued new guidelines on July 10, 1967, which included the obligation on the employer to make reasonable accommodations to the religious needs of employees and prospective employees where such accommodations can be made without undue hardship on the conduct of the employer's business.⁵

These guidelines were extensively litigated in *Dewey v. Reynolds Metals Co.* In three separate opinions the District Court ruled in favor of Dewey.⁶ The Court of Appeals for the Sixth Circuit reversed, holding *inter alia*, that Title VII did not ban facially neutral employment practices which had the effect of terminating Dewey's employment because of his religious beliefs and practices.⁷ The Supreme Court affirmed this decision in a four to four vote.⁸

Thus, the validity of the 1967 E.E.O.C. Guidelines was questionable in 1972. Further, the Court had decided *Griggs v. Duke Power Co.*, 401 U. S. 424 (1971), which held, *inter alia*:

"The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. . . . But Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation. More than that, Congress has placed on the employer

⁵E.E.O.C. Guidelines on Discrimination Because of Religion, 29 *C.F.R.* §1605.1.

⁶291 F. Supp. 786 (W.D. Mich., 1968); 300 F. Supp. 709 (W.D. Mich., 1969); and 304 F. Supp. 1116 (W.D. Mich., 1969).

⁷429 F. 2d 324 (6th Cir., 1970).

⁸402 U. S. 689 (1971).

the burden of showing that any given requirement must have a manifest relationship to the employment in question." 401 U. S. 431-432.

From 1971 to the present there have been two possible interpretations of the meaning of religious discrimination under Title VII. First, Title VII prohibits an employer action or rule that is otherwise neutral on its face, such as a requirement that all workers must work on Saturday, if the action is not uniform in its impact on employees holding differing religious beliefs unless the employer can prove "business necessity."⁹ Second, Title VII prohibits a neutral-on-its-face employment practice which has a discriminatory impact on employees holding differing religious beliefs, but allows for exculpation (1) if the employer has made an effort reasonably to accommodate the religious needs of the employee, or (2) if an accommodation cannot be made without undue hardship to the employer.

Congress enacted Section 701(j)¹⁰ in 1972 in answer to the uncertainty created by the *Dewey* decisions. Senator Randolph added this section to show that Congress did intend to require of employers' the reasonable accommodation required by the 1967 E.E.O.C. Guidelines. He placed in the Congressional Record copies of the Sixth Circuit *Dewey* decision and a District Court

⁹This burden is great. See *Robinson v. Lorillard Corp.*, 444 F. 2d 791, 798 (4th Cir. 1971); *U. S. v. Bethlehem Steel Corp.*, 446 F. 2d 652, 662 (2d Cir. 1971) ("necessity connotes an irresistible demand").

¹⁰12 U.S.C. §2000e-(j) (March 24, 1972).

opinion unfavorable to an employee's exercise of his religious beliefs.¹¹

Without the E.E.O.C. Guidelines and Section 701(j) employers would not now be free to discriminate on the basis of religion so long as their actions are not based on an intention to discriminate. Clearly, requiring employers to reasonably accommodate religious needs, unless the accommodation places undue hardship on the conduct of the employer's business, is a less onerous and burdensome standard than requiring an employer to demonstrate that a policy or practice is dictated by business necessity.

B. THE RELIGIOUS ACCOMMODATION PROVISION RENDERS "RELIGION" A NEUTRAL FACTOR IN EMPLOYMENT.

There are basically two levels of discrimination. The first level is the blanket rejection of a job-seeker because of that person's race, color, *religion* or national origin.

The company does not contend, nor does Judge Celebrezze in his dissent, that Congress did not have the authority to outlaw discrimination on this level (Pet. brief at page 40; 516 F. 2d at 559-560).

However, they then contend that Congress does not have the power to outlaw discrimination on the second level—the practice of one's religion.

Religiously based activities can be protected by the First Amendment and in this instance by Congress. *Wisconsin v. Yoder*, 406 U. S. 205 (1975); *Sherbert v.*

¹¹118 Cong. Rec. 706-13 (1972) (remarks of Senator Randolph).

Verner, 374 U. S. 398 (1963); *Murdock v. Pennsylvania*, 319 U. S. 105 (1943).

By rejecting the "reasonable accommodation" provision the Court would be exempting religious discrimination from *Griggs*.

If ever there is a clear application of *Griggs*, the area of religious discrimination is it.

However, Congress has relieved the employer of the heavy burden of *Griggs* in religion cases. He is only required to "reasonably accommodate" and even then only "without undue hardship on the conduct of (his) business" 42 U. S. 2000e(j) 1974.

Congress has not written an absolute. It has created a balancing factor. The wishes of the employee are not always followed. *E.g.*, *Williams v. Southern Union Gas Co.*, 529 F. 2d 483 (10 Cir. 1976), *cert. pending*, No. 75-1511 or *Reid v. Memphis Pub. Co.*, 521 F. 2d 512 (6th Cir. 1975), *cert. pending* No. 75-1105.

C. THE 1972 AMENDMENT AND 1967 GUIDELINE MEET THIS COURT'S TRIPARTITE ESTABLISHMENT CLAUSE TEST.

What little benefit that accrues to individual churches is incidental and is certainly not the type prohibited.

"It is sufficient to note that for the men who wrote the Religion Clauses of the First Amendment the 'establishment of a religion connoted a sponsorship, financial support, and active involvement of the sovereign in religious activities. *Walz v. Tax Commission*, 397 U. S. 664, 701 (1970). See also *Engel v. Vitale*, 370 U. S. 421 (1962).

There will always be an incidental benefit to religion whenever Congress or the states act in this area. *E.g. Tilton v. Richardson*, 403 U. S. 672 (1971); *Everson v. Board of Education*, 393 U. S. 97 (1968); *Board of Education v. Allen*, 392 U. S. 236 (1968).

However the First Amendment "does not say that in every and all aspects there shall be a separation of Church and State." *Zorach v. Clauson*, 343 U. S. 306, 312.

It may well be that Senator Jennings Randolph when he sponsored the 1972 amendment felt that it would help his own religion. It could be just as easily argued that failure to enact the amendment would violate the other provision of the First Amendment *i.e.*, the prohibition "of the free exercise thereof. . . ."

In eliminating discrimination based on religion, Congress looked to the facts to see how people were being discriminated against. This is not impermissible and is in fact preferable in our system.

As stated by Mr. Justice Douglas in *Zorach*:

"When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe." 343 U. S. at 314.

1. Purpose.

This Court just recently restated this test in *Roe-mer v. Board of Public Works of Maryland* — U. S. —, 44 L. W. 4939, 4943 quoting *Lemon v. Kurtzman*, 403 U. S. 602 (1971):

“First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . .; finally the statute must not foster ‘an excessive government entanglement with religion’.” 403 U. S. at 612-613.

Accord, *Meek v. Pittenger*, 421 U. S. 349, 358 (1975); *Committee for Public Education v. Nyquist*, 413 U. S. 756, 772-3 (1973); *Tilton v. Richardson*, 403 U. S. 672, 678 (1971).

The purpose of the “religious accommodation” amendment is to insure that a person is not discriminated against because of the practice of his religion. The purpose behind Title VII was to see that the job market was not restricted to persons because of their religion, among other things.

The area in which Sabbatarians need to be protected is in their right to freely exercise their beliefs.

“The freedom to believe and to practice strange and, it may be foreign creeds, has classically been one of the highest values of our society.” *Braunfield v. Brown*, 366 U. S. 599 (1961) (Brennan, J. dissenting); *c.f.* *Murdock v. Pennsylvania*, 319 U. S. 105 (1943); *Jones v. Opelika*, 319 U. S. 103 (1943); *Martin v. Struthers*,

319 U. S. 141 (1943); *Follett v. McCormick*, 321 U. S. 573 (1944).

Congress intended to remove a barrier that favored a group of employees over others. *Griggs, supra* at 430.

Congress wanted to eliminate the situation where an employee was forced to abandon “one of the precepts of” his “religion in order to accept work. . . .” *Sherbert v. Verner*, 374 U. S. 398, 404 (1963).

Interestingly, Parker Seal and Judge Celebrezze seem to feel that the prohibition against religious discrimination would still help the Sabbath observer if he could show that “similarly situated employees were not required to work on Saturdays.” 516 F. 2d at 559-560. That of course overlooks the obvious. Other employees would not have the objection to working on Saturdays that Sabbatarians would, any more than Cummins would have objected to working on Sundays.

The Congress established the public policy of the United States in 1964 that certain forms of discrimination, *i.e.*, discrimination because of race, color, religion, sex and national origin should be unlawful because such discrimination denies individuals equal employment opportunity and the nation the full productive capacities of its citizens.

The right to employment is extremely important in our society. The Supreme Court recognized the value of this right many years ago in *Truax v. Raich*, 239 U. S. 33, 41 (1915):

“It requires no argument to show that the right to work for a living in the common occupations of

the community is of the very essence of the personal freedom and opportunity that it was the purpose of the amendment to secure."

If men and women are to be terminated from employment because their religious beliefs do not allow them to work on Saturdays, then a substantial minority segment of the nation's work force will be denied the opportunity to compete as equal job competitors with those individuals who subscribe to majoritarian religious belief and practice. Unless some effort is made to accommodate these religious practices, there will be the discrimination on the basis of religion which Section 703(a) of Title VII was enacted to prevent.

Unquestionably, by attacking the evil of discrimination, because of religion in employment, Congress has acted to facilitate the free exercise of religion.

The burden, if it is a burden, on employers to cease discriminating on the basis of religion was placed on them by enactment of Section 703(a) of Title VII effective July 2, 1965, and was not placed there by any E.E.O.C. Guideline or the enactment of Section 701(j) of Title VII effective March 24, 1972.

2. Effect.

The second part of the test is that the questioned provision not have a "primary effect" that neither advances *nor* inhibits religion."

" . . . Whether, in short, they tend to promote that type of interdependence between religion and state which the First Amendment was designed to pre-

vent." *Abington School District v. Schempp*, 374 U. S. at 236 (Brennan, J. concurring).

Here there is not the forbidden effect on religion. *McCullum v. Board of Education*, 333 U. S. 202 (1948); *Epperson v. Arkansas*, 393 U. S. 97 (1968). There is nothing in Title VII which involves government "in the essentially religious activities of religious institution." *Lemon v. Kurtzman*, 403 U. S. at 658 (Brennan, J. concurring).

And it is clear that, "not every law that confers an 'indirect,' 'remote' or incidental benefit upon religious institutions is, for that reason alone, constitutionally invalid." (Emphasis added.) *Nyquist, supra*, 413 U. S. at 771. See also *Roemer v. Board of Public Works of Maryland*, 44 L.W. 4939 (1976); *Tilton v. Richardson, supra*; *Walz v. Tax Commission, supra*.

There is no "sponsorship, financial support and active involvement of the sovereign in religious activity." *Walz, supra*, 397 U. S. at 668.

The "religious accommodation" does not aid "all religion against non-believers." In fact, the provisions have been held to apply to atheists—as well they should. *Young v. Southwestern Savings and Loan Assn.*, 509 F. 2d 140 (5th Cir., 1975).¹²

Government is neither theocratic nor antagonistic to religion. It is neutral but takes cognizance of the nature of the people.

¹²"Congress, through Title VII, has provided the Courts with a means to preserve religious diversity from forced religious conformity." *Supra*, 509 F. 2d at 141. Thus an atheist could not be compelled to attend a devotional service. Obviously, the "religious needs" of an atheist are less than that of a believer, but that is a choice on their part.

"For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion to those who do believe. *Zorach, supra*, 343 U. S. at 313-314.

The effect of the accommodation is so remote as to be *de minimus*. The primary benefit (that is, being free from employment discrimination) accrues to *individuals* and not any religious organizations. This type of "aid" has been upheld by this Court repeatedly. E.g. *Everson v. Board of Education*, 330 U. S. 1 (1947). School bus transportation for parochial students; *Board of Education v. Allen*, 302 U. S. 236 (1968) textbooks given to parochial students.

As stated in *Sherbert v. Verner, supra*, 374 U. S. at 412: "Payments will be made to her not as a Seventh Day Adventist, but as an unemployed worker."

The primary effect of the provision requiring an accommodation is simply to insure that each individual employee will be, to the greatest extent possible, treated identically with every other employee. It insures that the plaintiff's religion does not function to penalize his employment opportunities. Title VII attacks discrimination rather than fosters religion.

Since we do live in a society that generally acknowledges Sunday as the Sabbath, Saturday Sabbatarians are placed at a disadvantage. *McGowan v. Maryland*, 366 U. S. 420 (1961); *Gallagher v. Crown Kosher Mar-*

ket, 366 U. S. 617 (1961); *Two Guys from Harrison-Allentown, Inc. v. McGinley*, 366 U. S. 582 (1961).

The fact is that Parker Seal, like most companies, schedules any additional work on Saturdays not Sundays (R. 135).

The company has decided within the framework of a predominantly Christian Sunday-Sabbath oriented society that it would not work on Sundays but rather on Saturdays if one extra day was needed for production. (See *McGowan, supra*, 366 U. S. at 56, Douglas, J. dissenting).

This accommodation only restricts an employer as regards to individual employees—and that is not an absolute restriction.

As the Sixth Circuit stated:

"Surely this constitutes a lesser interference with the rights of the employer than does a law requiring the employer to close his business entirely." *Cummins v. Parker Seal Co., supra*, 516 F. 2d at 554.

By not requiring an accommodation, Congress would be perpetuating an inequity against Sabbatarians and failing in their duty to protect religious freedom.

"When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain." *Engel v. Vitale*, 370 U. S. 421, 431.

Parker Seal seems to ignore this Court's pronouncement in *Wisconsin v. Yoder*, 406 U. S. 205 (1972) where a *particular* religious sect was exempt from a state compulsory education law.¹³

There the statute applied to all, as does *Parker Seal's* Saturday work rule, however in *Yoder* the Court said:

"A regulation neutral as its face may, in its application nevertheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion." 406 U. S. at —.

The company further skims over this Court's ruling in *Sherbert v. Verner*, *supra*, since that case was brought under the Fourteenth Amendment. This, if Cummins had been employed by a governmental agency he would have protected prior to the enactment of Title VII. What Congress did with the enactment of Title VII was in effect to apply the Fourteenth Amendment standard, to private employees of private employers.

This is certainly nothing new and this term the Court ruled that Congress could do so in outlawing racial discrimination in private schools. *Runyan v. McCrary* — U. S. — 44 L.W. 5034 (June 25, 1976). See also: *Jones v. Mayer*, 392 U. S. 409 (1968) and *Tillman v. Wheaton-Haven Recreation Assn.*, 410 U. S. 431 (1973).

¹³The Court further noted that there is a specific governmental pronouncement, 26 U.S.C. §1402(h) that exempts the Amish from the payment of Social Security taxes.

If Congress can extend the coverage of 42 U.S.C. §1981 and 42 U.S.C. §1982 to cover private contracts it can extend the protection of the Constitution to safeguard religious practices.

As stated by Chief Justice Burger in *Nyquist*, *supra*, 413 U. S. at 82:

"The answer, I believe, lies in the experienced judgment of various members of this Court over the years that the balance between the policies of free exercise and establishment of religion tips in favor of the former when the legislation moves away from direct aid to religious institutions and takes on the character of general aid to individual families."

3. Entanglement.

This Court dealt with several types of cases involving "excessive entanglement" of government in religion.

Many of these relate to monitoring or auditing financial aid. E.G. *Roemer v. Board of Public Works of Maryland*, *supra*; *Tilton v. Richardson*, *supra*; and *Hunt v. McNair*, *supra*. See also *Lemon v. Kurtzman*, *supra*, 403 U. S. at 617-618 where religion "pervaded the school system" and "(R)eligious formation is not confined to formal courses, nor is it restricted to a single subject area."

Others relate to sincerity of belief. *Welsh v. United States*, 398 U. S. 333, 370 (1970) White, J. dissenting: "The Court could as Congress has done exempt religious objectors to wars. And such an exemption would

be no more an establishment of religion than the exemption required for Sabbatarians in *Sherbert v. Verner*, 374 U. S. 398 (1963). And *Gillette v. United States*, 401 U. S. 437 (1971); *Wisconsin v. Yoder*, *supra*, 406 U. S. at 216 “. . . it is not merely a matter of religious preference, but one of deep religious conviction, shared by an organized group, and intimately related to daily living.”

And of course, *Walz v. Tax Commission*, *supra*, where government is required to intimately analyze a religious organization to determine its eligibility for tax-exempt status.

Thus the test is that of “excessive entanglement.” In a Title VII case one has to stretch to see any entanglement caused by the “reasonable accommodation” provision.

Since “religious discrimination” is already outlawed then obviously the religion of the person filing a complaint with E.E.O.C. is pertinent. Secondly, the beliefs of that religion need to be known for any reasonable understanding of the alleged discrimination. Rarely, if ever, does the issue of sincerity arise. (E.g. *Cummins v. Parker Seal Co.*, *supra*; *Hardison v. Trans World Airlines, Inc.*, 527 F. 2d 33 (8th Cir. 1975), cert. pending No. 75-1126; *Young v. Southwestern Savings and Loan Assn.*, *supra*.)

Any involvement the government has in Title II religion cases is peripheral and mandated by the Congressional desire to outlaw religious discrimination in employment.

What entanglement there is for a secular purpose—to see if the law is being complied with.

General supervision by the state, in the area of religion has never been proscribed. (E.g. *Zorach*, *supra* and *Roemer*, *supra*.)

In dissent, Judge Celebrezze laments that the “wall” between Church and State has been breached. *Cummins*, *supra*, at 555.

This Court has recognized that there is no wall but rather “a blurred, indistinct and variable barrier depending on all the circumstances of a particular relationship.” *Lemon v. Kurtzman*, *supra*, 403 U. S. at 614.

It is blurred because each case stands alone. Here Congress is extending the Constitutional right to freely exercise one’s religion to the private sector. This is no more unconstitutional than to exempt Sabbatarians from Sunday closing laws. *Braunfeld v. Brown*, 366 U. S. 599, 614 (1961) Brennan, J. dissenting.

The freedom to practice one’s religion is not absolute. *Reynolds v. United States*, 98 U. S. 187 (1878); *Prince v. Massachusetts*, 321 U. S. 158 (1944); nor should it be.

Government should not take a hostile attitude toward religion because there are “unavoidable accommodations necessary to achieve the maximum enjoyment of each and all of them . . .” *Abington School District*, *supra*, 374 U. S. at 306, Goldberg, J. concurring.

Here Congress has given a clearly defined accommodation. A “reasonable accommodation” that does not cause an “undue hardship” on the employer’s busi-

ness. It is not an absolute. Congress does not require every employer to accommodate every employee because of his religion. Congress did not give an employee an unfettered right to exert his religious beliefs.

An individual's religious beliefs must give way to an employer's needs. An employee's beliefs and practices must give way if an employer can demonstrate said practices are unreasonable or that the practices will do "undue hardship" to the employer. It is a practical statute designed to allow for the religious diversity for which our forefathers fought, while, at the same time, allowing employers to compete in the business world.

II. The Court of Appeals Correctly Held That Parker Seal Did Not Meet Its Burden of Showing That They Were Unable to 'Reasonably Accommodate' Cummins Without Undue Hardship.

The company righteously contends that it fulfilled its obligation to Cummins because it accommodated him for over a year and that now that gratuitous accommodation has been used against them by the Court of Appeals.

The fact of the matter is that Cummins' supervisor became *aware* that he was not working on Saturdays in the summer of 1971 and he was terminated in September of 1971 (R. 1973). And then the problems were basically occasioned by vacation scheduling (R. 175).

The Court of Appeals correctly found that Cummins "was discharged because his refusal to work on Saturday was causing considerable consternation and

problems with the rest of our employees who were being required to work a full shift." *Cummins, supra*, 516 F. 2d at 550 (R. 231).

This "grumbling" or irritation is not unusual.¹⁴

In fact, about the only worth in detailing the other cases is that it exemplifies the theory that in the area of reasonable accommodation each case must stand on its own facts. Thus, in one instance a demotion may be a reasonable accommodation (E.g. *Dixon v. Omaha Public Power Dist.*, 385 F. Supp. 1382 (D. Neb. 1974); whereas in another factual setting a demotion or downgrade is not a reasonable accommodation, e.g. *Ward v. Allegheny Ludlum Steel Corp.*, 397 F. Supp. 375 (W.D. Pa. 1975), appeal pending (3rd Cir.).

There is really no comparison between the permanent accommodation of a foreman as in *United States v. City of Albuquerque*, 9 E.P.D. 10, 182 (C.D. Cal. 1975) and the once-a-month accommodation of a minister from a factory job as in *Weitkenaut v. Goodyear Tire & Rubber Co.*, 381 F. Supp. 1284 (D.Ut. 1974).

Here the Sixth Circuit found that the District Court committed errors of law in its application of the facts. The company does not contend that the Court is misstating the facts.

There is no question why Cummins was fired because his religion did not permit him to work on Saturdays (R. 230-231).

¹⁴*Draper v. United States Pipe & Foundry Co.*, 527 F. 2d 515 (6th Cir. 1975) and *Hardison v. Trans World Airlines, Inc.*, 527 F. 2d 33 (8th Cir. 1975) cert. pending, No. 75-1126.

The only "undue hardship" the company can point to is the morale problem. This, of course, was specifically rejected by the Sixth Circuit as well as the Eighth (Hardison, *supra*).

The company mistakenly feels that the burden of accommodation is shared equally by the employer and employee alike, however Section 701(j) states, in part

"unless an *employer* demonstrates that he is unable to reasonably accommodate . . ."

Although the factual record shows that Cummins did volunteer and the Circuit Court so found, the company seems to ignore that fact. (Compare Pet. brief, p. 46 and *Cummins, supra*, at 546, R. 115.)

An employer cannot be said to be fulfilling its duty by shifting it back to the employee.

Cummins never took an "intransigent position." E.g. *United States v. City of Albuquerque*, 9 E.P.D. 10, 182 at 7825, 7830 (C. D. Cal. 1975). He obviously wanted to keep his job but at the same time practice his religion.

The company constantly refers to what Cummins failed to do. What is important is what the company failed to do.

They never offered him a transfer.

They never offered him a different job.

They never told him they would have to reduce his pay commensurate with his reduced work load.

They didn't assign him to non-Sabbath work.

The terms they offered were so vague as to be non-existent. The company was forcing him to justify his religion to the other employees who were disgruntled.

Other employees worked on their Sabbaths. Obviously, they felt that they could maintain the precepts of their chosen religion and work on their Sabbath. Cummins could not. That is why Congress added the 1972 amendment to Title VII—to protect the Paul Cummins'. Congress wanted to eliminate the situation, as much as possible when an employee would have to choose between his religion and his job.

Instead of dealing with the real problem—the dissatisfaction of other employees—the company simply terminated Cummins.

Congress used the words "undue hardship." Obviously, that is more than mere hardship. The Sixth Circuit called the situation an "inconvenience", *supra*, at 550.

If this situation were to be construed as an undue hardship then it would be difficult to perceive what facts would not constitute such.

The company details numerous broad instances where a reasonable accommodation arguably could not be made. Obviously, that situation exists—but not here. The Court below found so.

Regardless of all that is said by the company, they can accommodate because they did accommodate. The only problem arose, during a temporary vacation situation and the employees' grumbling was related to general working conditions rather than Cummins' situation.

The company somehow seems to feel that as long as its policy was uniformly applied, it was valid.

The Kentucky Commission on Human Rights adopted that reasoning (Pet. 5a). Presumably the District Judge did also. Of course, that is not the law as stated in *Griggs*.

"But Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation. More than that, Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question." *Supra*, 401 U. S. at 423.

There can be little doubt that the policy of Parker Seal had the effect of discriminating against Cummins. This fact has not been challenged by the company. The only question which remains is whether the "business necessity" of the Defendant is sufficient to overcome the manifest public policy of non-discrimination.

Policies which have a discriminatory effect are seldom sustained. *Local 189, United Papermakers & Paperworkers v. United States*, 416 F. 2d 980 (5th Cir. 1969) Cert. denied, 397 U. S. 919 (1970); *Jones v. Lee Way Motor Freight, Inc.*, 431 F. 2d 245 (10th Cir. 1970); *United States v. International Brotherhood of Electrical Workers, Local 38*, 428 F. 2d 144 (6th Cir. 1970), Cert. denied, 400 U. S. 943 (1970) (Race) and *Weeks v. Southern Bell Telephone & Telegraph Company*, 408 F. 2d 228 (5th Cir. 1969); *Bowe v. Colgate Palmolive Company*, 416 F. 2d 711 (7th Cir. 1969); *Cheatwood v. South Central Bell Telephone & Telegraph Company*, 303 F. Supp. 754 (D.C. Ala. 1969) (Sex).

Thus the Courts have uniformly held that, when the discriminatory effect is established, the burden shifts to the employer to prove that the policy is necessitated by business considerations. This the company utterly failed to do—or even attempt to do. The only attempt on their part to resolve the conflict was to attempt to get Cummins to change his religion.

As the language of the 1976 amendment makes clear, religious discrimination must be considered on a case by case basis. In practically every case, however, there will be some form of employee dissatisfaction and/or dissension.

Employee dissatisfaction cannot be accorded the status of an overriding legitimate business purpose. There must be available no acceptable alternative policies or practices which would better accomplish the business purpose advanced, or accomplish the purpose equally well without firing Cummins. *Robinson v. Lorillard Corporation*, 444 F. 2d 791, 798 (4th Cir. 1971).

Parker Seal made no effort to determine if other actions could have been taken by management which would have alleviated the situation. Parker Seal assumed that it had only two choices, i.e., fire Cummins or get him to change his religion.

Parker Seal failed to meet its affirmative obligation imposed on it by Congress and consequently is guilty of discriminating against Paul Cummins because of his religion.

CONCLUSION

For the foregoing reasons, Paul Cummins, Respondent, submits that the decision of the Sixth Circuit of Appeals is correct and should be affirmed in all respects.

Respectfully submitted,

THOMAS L. HOGAN
701 W. Walnut
Louisville, Kentucky 40203

AND

JAMES C. HICKEY
EWEN, MACKENZIE & PEDEN, P.S.C.
2100 Commonwealth Building
Louisville, Kentucky 40202

*Attorneys for Respondent,
Paul Cummins*

FOR ARGUMENT

Supreme Court, U. S.
FILED

OCT 4 1976

MICHAEL RODAK, JR., CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-478

PARKER SEAL COMPANY, *Petitioner*

v.

PAUL CUMMINS, *Respondent*

On Writ of Certiorari to the United States
Court of Appeals for the Sixth Circuit

REPLY BRIEF FOR PETITIONER

PATRICK F. J. MACBORY

LEONARD H. BECKER

PAUL S. RYERSON

1229 Nineteenth Street, N.W.

Washington, D.C. 20036

—and—

BENNETT CLARK

1000 First Security Plaza

Lexington, Kentucky 40507

Attorneys for Petitioner

Parker Seal Company

Of Counsel:

ARNOLD & PORTER

1229 Nineteenth Street, N.W.

Washington, D.C. 20036

STOLL, KEENON & PARK

1000 First Security Plaza

Lexington, Kentucky 40507

TABLE OF CONTENTS

	Page
I. PARKER SEAL MADE REASONABLE EFFORTS TO ACCOMMODATE CUMMINS UNDER THE STATUTORY SCHEME .	1
II. THE ESTABLISHMENT CLAUSE GOVERNS THE "RELIGIOUS ACCOMMODATION" SCHEME	9
III. THE "RELIGIOUS ACCOMMODATION" SCHEME CANNOT PASS MUSTER UNDER THE COURT'S THREE PART ESTABLISHMENT CLAUSE TEST	15
CONCLUSION	21

TABLE OF CITATIONS

CASES:

Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975)	
Amalgamated Food Employees Union v. Logan Valley Plaza, Inc., 391 U.S. 308, 330 (1968)	15
Braunfeld v. Brown, 366 U.S. 599 (1961)	12
Committee for Public Educ. v. Nyquist, 413 U.S. 756, 772 (1973)	19
Everson v. Bd. of Educ., 330 U.S. 1, 16 (1947)	9, 16
Gillette v. United States, 401 U.S. 437 (1971)	12, 19
Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971) ..	2
Hudgens v. NLRB, 424 U.S. 507, 516-18 (1976)	15
Hunt v. McNair, 413 U.S. 734, 743 (1973)	19
Johnson v. United States Postal Service, 497 F.2d 128 (5th Cir. 1974)	2
Lemon v. Kurtzman, 403 U.S. 602, 618-19 (1971)	20
Lloyd Corp. v. Tanner, 407 U.S. 551, 562-63, 565 (1972)	15
Marsh v. Alabama, 326 U.S. 501 (1946)	15
Meek v. Pittenger, 421 U.S. 349, 366 (1975)	19, 20
Roemer v. Bd. of Public Works, — U.S. —, 96 S.Ct. 2337, 2344 (June 21, 1976) (No. 74-730)	16, 18-19
Serbian Eastern Orthodox Diocese v. Milivojevich, — U.S. —, —, 96 S.Ct. 2372, 2380-83 (June 21, 1976) (No. 75-292)	20

	Page
Sherbert v. Verner, 374 U.S. 398 (1963)	12, 13
Torcaso v. Watkins, 367 U.S. 488, 495 (1961)	16
Walz v. Tax Commission, 397 U.S. 664, 670 (1970) ..	16, 19
Welsh v. United States, 398 U.S. 333 (1970)	14
Wisconsin v. Yoder, 406 U.S. 205 (1972)	12, 13
Zorach v. Clauson, 343 U.S. 306 (1952)	13
STATUTE:	
42 U.S.C. § 2000e(j)	20
MISCELLANEOUS:	
118 Cong. Rec. 705	18

IN THE
Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-478

PARKER SEAL COMPANY, *Petitioner*

v.

PAUL CUMMINS, *Respondent*

On Writ of Certiorari to the United States
Court of Appeals for the Sixth Circuit

REPLY BRIEF FOR PETITIONER

**I. PARKER SEAL MADE REASONABLE EFFORTS TO ACCOM-
MODATE CUMMINS UNDER THE STATUTORY SCHEME**

Neither Cummins nor the *amici* seriously dispute that if this case had arisen under the basic anti-discrimination provision of Title VII, Parker Seal's proof before the Kentucky Commission and the federal trial court would have amply vindicated its position: The company may validly require a plant supervisor who heads up a department and functions as a part of management to be present on the job whenever his unit is scheduled for work. This simple, even-handed requirement surely would satisfy the test laid down

by the Court in *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971): that the employment rule have “a manifest relationship to the employment in question.”¹ As the United States concedes in its belated brief *amicus*, a person’s refusal to work, even if attributable to his religious beliefs, may validly bear upon his employment opportunities “when it significantly affects his job qualifications” (U.S. Br. 15).² That concession is dictated by this Court’s holding in *Griggs*: “Far from disparaging job qualifications as such, Congress has made such qualifications the controlling factor, so that race, *religion*, nationality, and sex become irrelevant.” *Griggs*, 401 U.S., at 436 (emphasis supplied).

Here Cummins’ “religious practices”—his refusal to work Saturdays—indisputably “[were] sufficiently relevant to his job qualifications that they [might] properly be taken into account in connection with an employment practice”—a requirement of Saturday work (U.S. Br. 15-16). Not only did Cummins consistently refuse to perform the Saturday work his supervisory position entailed; he conceded that he would have refused Saturday labor even in an emergency, and even if the Saturday substitute whom Parker Seal furnished Cummins for over a year was unavailable (R. 102).

¹ *Accord: Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975).

² Although the Government appears as *amicus* in support of Cummins, its status as employer has led it to resist claims of its public employees for exemption from Saturday work, even on behalf of agencies considerably larger (if not more profitable) than Parker Seal’s Berea operation. See *Johnson v. United States Postal Service*, 497 F.2d 128 (5th Cir. 1974).

Even in the context of the expanded obligations imposed by the 1972 “religious accommodation” amendment to Title VII, neither Cummins nor the *amici* quarrel in principle with the factors which Parker Seal urges should be taken into account in assessing the reasonableness of its efforts to accommodate Cummins—efforts which demonstrate that Parker Seal acted properly under the statute (*see* Pet. Br. 44-55). Instead, Cummins now contends, Parker Seal should be held at fault because the company failed to coerce a solution—specifically, to force Cummins to take on different work hours, to assign him to a lower-ranking job, or to cut his pay (*see* Resp. Br. 28). These contentions are meritless.

—*Assignment to non-Saturday work.* It is suggested that Parker Seal could have alleviated the disparity in hours between Cummins and his fellow supervisors by assigning Cummins to more weekday work—an assignment which Cummins says he was willing to accept (Resp. Br. 28; COLPA Br. 25-26; U.S. Br. 20-22). There are three difficulties with this argument.

First, Parker Seal’s plant manager at Berea made the judgment that Cummins could not simply be directed to take on new hours; he was a plant supervisor, “part of management” (R. 79). The plant manager reasonably concluded that he would not “giv[e] orders to supervisors”; rather, as part of his effort to forge a team with independent initiative, he expected his supervisors to work out scheduling matters on their own (R. 178, 185-86).³ Thus, contrary to the

³ This view was corroborated by Cummins’ membership in the Cost Goal program, a company-wide profit-sharing system which turned on each participant’s initiative, incentive, and ingenuity (R. 80, 211-12).

Government's contention that "nothing in the record suggests" that an explicit directive to Cummins "was even considered by the company" (U.S. Br. 22), the record shows that such a managerial edict was considered, but ruled out.

Second, the Berea plant rarely operated on Sundays (R. 108, 135, 198-99). Thus, to impose longer weekday hours on Cummins would still have left him during the busy season with one less day of work per week than his fellow supervisors. The disparity in days worked would have prevailed throughout the period from Memorial Day to Labor Day (R. 198). The imposition of these added, uncompensated burdens on Cummins' fellow supervisors surely amounted to more than the mere "adjustment" in work schedules which the Government now suggests the EEOC may lawfully compel (*see* U.S. Br. 14-15).

Third, the argument for reassignment assumes that Cummins volunteered to relieve his fellow-supervisors during the week. But Cummins testified that he made such offers in 1970, when he first refused to work on Saturdays—not a year later in 1971, when his persistent unwillingness to carry his fair share of the load led to his discharge (R. 115-16). Even if his testimony is read expansively to cover the entire period, that testimony was contradicted by his plant manager and by each of the two knowledgeable fellow supervisors called to give evidence—one of them his own brother-in-law (R. 137). They testified that Cummins rarely volunteered to help them out—two or three times for Fain (R. 142), and three or four for Webb (R. 153, 155)—even after the plant manager had pointedly suggested such an arrangement as the solution to the

problem (R. 185, 202-03).⁴ Significantly, Cummins never set up a proposed schedule for mid-week substitution or asked his superior to do so (R. 98-99).

In sum, Parker Seal's Berea plant manager made the reasonable proposal that Cummins should "go down and volunteer to take over a four (4) hour period for [his three fellow workers] in the evening" (R. 185). Contrary to Cummins' present complaint that Parker Seal's willingness to let him work out his scheduling problems with his fellow supervisors "fore[ed] him to justify his religion to the other employees who were disgruntled" (Resp. Br. 28), there was nothing "vague" or "anti-religious" about this suggestion: Cummins simply chose not to follow it.

The finders of fact below were well within their rights to credit the abundant evidence of Cummins' lack of cooperation. The Kentucky Commission on Human Rights heard the live testimony of the witnesses and observed their demeanor. It was cognizant of the evidentiary conflict on Cummins' willingness to volunteer, as was reflected in the probing questions which its members put to the witnesses (R. 98-99, 190-92). Moreover, the Commission was entitled to review the conflicting testimony in light of other circumstances—particularly, Cummins' concession that with no ostensible religious excuse, he had regularly refused to come in early with his shift during the week in violation of established company policy (R. 166-67, 169, 177).

Cummins had the opportunity to relitigate this (and every other) issue in a trial *de novo* before the federal

⁴ On one of these occasions, Cummins was "sort of a forced volunteer" when Fain was out sick (R. 183).

district court. He chose instead to rest on the record compiled in the state proceeding (R. 242). The trial court was entitled to draw an appropriate inference from Cummins' failure to adduce evidence, other than his own testimony, on the vital point of his willingness to cooperate.

—*Transfer to a different job.* Parker Seal's collective bargaining agreement with the union barred the company from shifting Cummins to a lower grade from his status as a supervisor in the Banbury department.⁵ The company carefully considered transferring Cummins, but concluded it was not feasible (R. 72). For his part, Cummins never expressed interest in lower-scale employment (R. 99, 100). It taxes credulity to suggest that he would have acceded without complaint to a demotion in employment status from his position as "part of management" (R. 79).

—*Reduction in pay.* As a supervisor, Cummins received a set salary, without regard to hours worked (R. 188); by virtue of his seniority, he made more money than his fellow supervisors while working fewer hours (R. 188, 197). Yet he never suggested to his superior that he would be willing to suffer a reduction in pay in recompense for his shortened work week (R. 91, 101). Now, picking up on a suggestion of the court of appeals below, Cummins says Parker Seal should have forced him to take a pay cut (*see* 516 F.2d, at 550 (Pet. 29a)). Such a cut would not have alleviated the problem occasioned by Cummins' Saturday

⁵ Contrary to the Government's present suggestion (U.S. Br. 24), the collective bargaining agreements, with which Cummins was familiar (R. 85-86, 101), were in evidence before both the Kentucky Commission (R. 85-86) and the federal district court (R. iii-iv).

absences. Moreover, it would have amounted to at least 11% (figured on Cummins' failure to work an average of 5 hours per week out of 45 scheduled), and perhaps as much as 45% (figured on the difference between his average 40-hour week and the 72-hour week put in by his fellow supervisors). It is unlikely that Cummins would have left unchallenged any such unilateral cut in pay.

—*Unnecessary work.* Finally, Cummins suggests that his presence on Saturdays was unnecessary; that the Banbury operation largely ran itself, and that he spent most of his time scheduling work rather than actively supervising. That may have been his opinion. It was not shared by his superior, who testified that "Paul, in a responsible position, running a department, had to be there if that department was to function the way it should" (R. 180), or by the supervisor who replaced Cummins in the Banbury and who spent only one hour per shift away from the floor to make up the schedules (R. 168).⁶ As with Cummins' failure to show up early for work with his men on mid-week shifts, the triers of fact were entitled to disbelieve Cummins' contention that his presence was unimportant.

Nor is there merit to Cummins' point that the second and (on occasion) third shifts of the Banbury

⁶ It is suggested that Cummins' absence on Saturdays was so unimportant that the new plant manager was ignorant of it until long after his arrival on the scene (Resp. Br. 26; COLPA Br. 24). This mischaracterizes the record. Haddock learned of the problem within two months after he took over in mid-winter (R. 203). Saturday work occurred every week during the summer, but only infrequently during the winter. Thus it is likely that few, if any, Saturday workdays occurred for the Banbury during the first two months of Haddock's managership.

operated without separate supervision. Cummins conceded that the Banbury shift operated better with supervision than without (R. 81); in any event, the lesser number of men on the later shifts (two to six as against the nine or 10 on the first shift) did not justify economically the hiring of an extra supervisor (R. 95, 117-18, 189, 219-20).

* * *

In sum, the record establishes that Parker Seal's efforts to accommodate Cummins were substantial. Its determination to discharge him after more than a year of providing substitutes at no cost to Cummins did not arise from callous indifference or subtle bias on the part of management. Rather, it reflected the considered judgment of the plant manager, in conjunction with the general manager of the corporate division (R. 206-07, 235-36), that business necessity compelled action which the company had striven for over a year to avoid.

A fair reading of the evidence thus dispels any suggestion that the court of appeals below somehow read the "dry record" better than the trial court (COLPA Br. 28; cf. Seventh-Day Br. 9-10). The court of appeals was not empowered to review the record as a *de novo* trier of fact. Nor is its reading of the record more plausible than that of the Kentucky Commission, which had the benefit of live testimony, and the federal trial court, before which Cummins had the opportunity—but chose not—to supplement his losing case. Each of those fact-finding tribunals applied the same statutory standard to a disputed set of facts and arrived at the same conclusion: that Parker Seal made a reasonable attempt to accommodate Cummins. Their common judgment can hardly be deemed clearly errone-

ous. In reversing on the basis of its own *de novo* reassessment of the evidence, the court of appeals exceeded the permissible scope of appellate review. Its "finding"—which Parker Seal vigorously disputes—that "the major reason" for Cummins' discharge was the resentment of his fellow supervisors, is belied by the record read fairly and in its entirety. The judgment below should be reversed on this basis alone.

II. THE ESTABLISHMENT CLAUSE GOVERNS THE "RELIGIOUS ACCOMMODATION" SCHEME

Under the Establishment Clause decisions of this Court, a statute could not survive which compelled one person to make a cash contribution to the church of another's choice. Presumably such a statute would fall, no matter how small the contribution in amount or infrequent in occurrence. *Everson v. Bd. of Educ.*, 330 U.S. 1, 16 (1947).

There is no difference in principle between such a statute and the "religious accommodation" scheme of Title VII which is the subject of this lawsuit. The "religious accommodation" scheme compels the employer to yield to the religious dictates of the employee—unless the employer can affirmatively show that the resultant alteration in his business practices imposes not just a "hardship," but an "undue" hardship. As one of the *amici* here would have it, not even a showing of an actual cash outlay on the part of Parker Seal would have established such undue hardship; the employer should have proved a "demonstrated reduction in efficiency or output, . . . [or] an *extraordinarily* untoward impact on employee relations" (COLPA Br. 28 & n.3) (emphasis supplied).

The core constitutional issue in this case is whether any statutory regime which imposes such a burden on one private party at the behest of another's religious dictates can pass muster under the First Amendment.

Cummins and the *amici* advance a number of arguments in an effort to avoid First Amendment analysis. *First*, they say that in enacting the "religious accommodation" scheme in 1972, Congress merely exercised its broad power under the Commerce Clause to outlaw discrimination in employment on religious grounds (*see* Resp. Br. 13-14; Seventh-Day Br. 3-6; COLPA Br. 9-11; U.S. Br. 25 *et seq.*). However, Cummins has all but dealt himself out of this argument. Before the Kentucky Commission on Human Rights, his counsel disclaimed any contention that Parker Seal had "intended to discriminate against Mr. Cummins or anyone else of his religion by having [its] Saturday working policy" (R. 30).

In any event, Title VII, as originally enacted in 1964, has at all times barred religiously-motivated discrimination in employment. The 1972 "accommodation" amendment was not necessary to accomplish this objective, and no evidence to the contrary was presented to Congress (*see* Pet. Br. 20-28). The amendment does not toughen the congressional ban against discrimination in response to any evidence of shortcomings in then-existing law. The amendment is what it says it is—a congressional directive that the employer must affirmatively make obeisance to his employee's religious dictates.⁷

⁷ A judicial determination that the 1972 "accommodation" amendment is unconstitutional will not disturb the basic statutory proscription against discrimination in employment on religious as well as other grounds set forth in Title VII as originally adopted in

Cummins and the *amici* implicitly concede that Congress in 1972 extended Title VII beyond its proscription of discrimination to outlaw something else—the employer's failure to alter business practices short of "undue hardship" in response to religiously-motivated demands. Constitutional authority for such an enactment, it is argued, may be found in the Commerce Clause (Seventh-Day Br. 4; U.S. Br. 25-27), the Necessary and Proper Clause (Synagogue Council Br. 21), the Free Exercise Clause of the First Amendment (Resp. Br. 13; Synagogue Council Br. 21; COLPA Br. 11), and the enabling clause of the Fourteenth Amendment (Seventh-Day Br. 4). The ultimate touchstone, the Government suggests, is one of "reasonableness" (U.S. Br. 29-31)—as though this case presented a Fifth Amendment challenge based on a generalized due-process complaint of substantive unfairness.

These arguments all miss the point. If the Establishment Clause could be put to one side, one or more of the foregoing provisions might well authorize the 1972 amendment. But the question here is not whether, apart from the Bill of Rights, Congress would have the power under the Constitution to enact the "religious accommodation" scheme. The issue is whether a specific provision of the Bill of Rights precludes the enforcement of such a statute. Unlike legislation designed to prohibit discrimination in employment based on race, sex, or age, a congressional statute which goes beyond a ban on religious discrimination to impose an affirmative

Section 703. There is thus no merit to the extravagant contention of one *amicus* that invalidation of this provision would implicitly deny any "justification for banning discrimination by race, or sex, or ethnic origins," and thereby call in question the constitutionality of all of Title VII (Seventh-Day Br. 4).

burden of "accommodation" runs headlong into the Establishment Clause.⁸

Finally, it is urged that the "religious accommodation" scheme merely carries over into the private sector the constraints which the Constitution imposes upon governmental activity. Surely, it is said, Congress may outlaw discrimination in private employment which the state and federal governments themselves are forbidden to undertake (Resp. Br. 22, 25; Seventh-Day Br. 3-6). The argument has a beguiling simplicity. It is true that under past decisions of this Court, the state and federal governments may refrain from imposing burdens on religiously-motivated people in the interest of preserving their free exercise of religion. *E.g.*, *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (Amish children exempt from mandatory public-school attendance); *Gillette v. United States*, 401 U.S. 437 (1971) (draft-law exemption for conscientious objectors is valid). Indeed, a failure to make such provision has sometimes—but not always—given rise to a First Amendment violation. Compare *Sherbert v. Verner*, 374 U.S. 398 (1963) (Free Exercise Clause compels granting of state unemployment benefits to one who refuses to work on Saturday due to his religious beliefs), with *Braunfeld v. Brown*, 366 U.S. 599 (1961)

⁸ Counsel for one of the *amici* recognized this difference when he wrote last year:

"Even in the absence of any 'undue hardship,' the constitutionality of the [1972 'accommodation'] amendment is not entirely beyond question. It is one thing for Congress to say that an applicant may not be denied a job in private industry merely because he is a Jew (or Negro or Puerto Rican); it is another thing to say that the employer must inconvenience himself or his business or suffer a hardship less than 'undue' so that the Jew can observe his own religion." L. Pfeffer, *God, Caesar, and the Constitution* 335 (1975).

(Free Exercise Clause does not invalidate Sunday "blue" law as enforced against commercial business of Orthodox Jews).

But it hardly follows that because the Government is constrained by the Free Exercise Clause to avoid infringement on the religious rights of its citizens, it may therefore coerce a private person to yield to the religious dictates of another. The decisions upon which Cummins and the *amici* rely uniformly substantiate the difference.

—*Sherbert v. Verner*, *supra*: The Court concluded that "the extension of unemployment benefits to Sabbatarians in common with Sunday worshippers reflects nothing more than the *governmental* obligation of neutrality in the face of religious differences." 374 U.S., at 409 (emphasis supplied).

—*Wisconsin v. Yoder*, *supra*: The overriding necessity to avoid governmental coercion of religious persons was the key to "recognizing an exemption for the Amish from the *State's* system of *compulsory* education." 406 U.S., at 234-35, n.22 (emphasis supplied).

—*Zorach v. Clauson*, 343 U.S. 306 (1952): The Court sustained a "released time" program under which New York City public schools permitted students to leave the premises to attend religious centers for instruction or devotional practices. Both the majority and the dissenters agreed that state coercion to enforce the scheme on unwilling participants—the element indisputably present in this case—would necessarily vitiate the practice. *Id.*, at 311-12 (opinion per Douglas, J.); 318 (Black, J., dissenting); 321-23 (Frankfurter, J., dissenting); 323-25 (Jackson, J., dissenting). As Mr. Jus-

tice Black put it in words directly applicable to this case:

"The state [here] . . . makes religious sects beneficiaries of its power. . . . Any use of such coercive power by the state to help or hinder some religious sects or to prefer all religious sects over non-believers or vice versa is just what I think the First Amendment forbids." *Id.*, at 318.

—*Welsh v. United States*, 398 U.S. 333 (1970): Four Justices broadly defined the provision granting a religious exemption from military service; one Justice, concurring, would have held the exemption invalid under the Establishment Clause. Mr. Justice White, dissenting (with whom the Chief Justice and Mr. Justice Stewart joined), rejected both approaches. Pertinently, he found no Establishment Clause violation in a statutory exemption drawn to avoid the *Government's* infringement on free exercise values that would have resulted from the absence of the exemption as enacted:

"Congress may have granted the exemption because otherwise religious objectors would be *forced* into conduct that their religions forbid and because in the view of Congress to deny the exemption would violate the Free Exercise Clause or at least raise grave problems in this respect. . . .

". . . [W]ithout the exemption, *the law would compel* some members of the public to engage in combat operations contrary to their religious convictions. Indeed, one federal court has recently held that to draft a man for combat service contrary to his conscientious beliefs would violate the First Amendment." 398 U.S., at 369-70, 371-72 (emphasis supplied).

—*Marsh v. Alabama*, 326 U.S. 501 (1946): The "company town" case does not indiscriminately extend the foregoing principles of governmental accommodation to the private sector. As Mr. Justice Black, the author of the Court's opinion in *Marsh*, subsequently observed, "*Marsh* dealt with the very special situation of a company-owned town, complete with streets, alleys, sewers, stores, residences, and everything else that goes to make a town." *Amalgamated Food Employees Union v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 330 (1968) (dissenting opinion). That careful reading of *Marsh* has prevailed in recent decisions where this Court has declined to extend *Marsh* to property not thoroughly dedicated to a public use. *Hudgens v. NLRB*, 424 U.S. 507, 516-18 (1976); *Lloyd Corp. v. Tanner*, 407 U.S. 551, 562-63, 565 (1972). Together, *Hudgens* and *Lloyd Corp.* stand for the proposition which controls this case—simply because the Constitution requires the Government (or private activity functionally indistinguishable from government) to avoid infringements upon First Amendment liberty, it does not follow that government may compel private persons to follow suit to the point of hardship something less than "undue."

III. THE "RELIGIOUS ACCOMMODATION" SCHEME CANNOT PASS MUSTER UNDER THE COURT'S THREE-PART ESTABLISHMENT CLAUSE TEST

1. *The statute reflects an unduly sectarian purpose.* Cummins concedes: "It may well be that Senator Jennings Randolph when he sponsored the 1972 amendment felt that it would help his own religion" (Resp. Br. 15). Indeed, Senator Randolph made clear in his sponsoring remarks—which constitute virtually all the legislative history which accompanies the 1972 amend-

ment—that aid to his own and other religions observing the Sabbath on Saturday was the whole point and purpose of his proposed amendment (*see* Pet. Br. 21-22). In such circumstances, it is reasonable to conclude that Congress intended to achieve what the statutory sponsor said his legislation would accomplish.

Cummins argues that the amendment may survive the first branch of the tripartite test despite its sectarian legislative purpose on the theory that it reflects a permissible preference by Congress of those who hold religious beliefs over those who do not (Resp. Br. 15). This argument overlooks the Court's explicit holdings to the contrary: a law which favors *all* religion over non-religion is constitutionally suspect. *Torcaso v. Watkins*, 367 U.S. 488, 495 (1961); *Everson v. Bd. of Educ.*, 330 U.S., at 15. *See also Walz v. Tax Commission*, 397 U.S. 664, 670 (1970).

Moreover, the statutory purpose here plainly reflects an even more constitutionally suspect preference for *some* religions over others—specifically, a preference for those which observe a Saturday Sabbath. This point is made not only by Senator Randolph's sponsoring remarks, set forth at length in our main brief at 21-23 & n.12, but also by the fact that each of the religious organizations which have filed *amicus* briefs in this case observes its Sabbath on Saturday.

In sum, the 1972 amendment offends the policy, reaffirmed by the Court only last Term, that the State must observe "a scrupulous neutrality . . . as among religions, and also as between religious and other activities. . . ." *Roemer v. Bd. of Public Works*, — U.S. —, 96 S. Ct. 2337, 2344 (June 21, 1976) (No. 74-730).

Next, Cummins purports to discern a valid secular purpose for the 1972 amendment in a supposed congressional intent "to remove a barrier that *avored* a group of employees over others" (Resp. Br. 17) (emphasis supplied). This "avored" group, whose enjoyment of an unfair preference is somehow eliminated by the 1972 amendment, is nowhere identified. Nor can it be. The only groups "avored" here are those, such as Cummins' and others similarly situated, for whose religious benefit the 1972 amendment was adopted. The "accommodation" scheme empowers persons who claim a religious motivation, and none other, to demand exemption from work rules. It is these persons who are "avored" over their non-religiously motivated colleagues by the creation of a special statutory license to insist upon preferred treatment by their employers.

2. *The 1972 "accommodation" scheme exhibits a primary effect which benefits religion.* Cummins and the *amici* implicitly concede that the 1972 amendment confers a benefit upon religion, but urge that the benefit is merely "incidental" (Resp. Br. 14, 19; Seventh-Day Br. 7; COLPA Br. 21). We ask: Incidental to what? What primary function is accomplished by this statute, such that the undenied benefit to selected religious groups and activities is merely a collateral, passing, or unintended consequence? The answer is that a benefit to selected religious entities is *the* consequence. The 1972 statute triggers a heightened duty on the part of the employer solely on the basis of the *religious* demands of his employees. As is illustrated by the increasing volume of "accommodation" cases in the courts below, the largest number of such demands for

accommodation have come from those who observe their Sabbath on a Saturday.⁹

Cummins also argues that the statutory scheme adopts a pattern of equality, not of favoritism—it “does not aid ‘all religion [as] against non-believers,’ ” he says, but “simply . . . insure[s] that each individual employee will be, to the greatest extent possible, treated identically with every other employee” (Resp. Br. 19, 20). This contention overlooks the plain language of the 1972 amendment. On its face the statute imposes a duty of “accommodation” upon the employer at the behest not of *all* employees, but only of religiously-motivated ones. A similar flaw undermines the somewhat narrower argument that equality of treatment may be found in the statute’s application to “*all* aspects of religious observance and practice—not merely Sabbath observance” (COLPA Br. 21) (emphasis in original).

Finally, in an effort to draw upon a distinction suggested in recent school-aid cases, it is urged that the “accommodation” scheme can survive the “primary effect” test because it aids religious individuals, not groups (Resp. Br. 20). But that distinction cannot save the statute from condemnation if the “accommodation” scheme operates in practice to effectuate religious rather than secular ends. *See Roemer v. Mary-*

⁹ According to one *amicus*, there is no evidence that the “religious accommodation” scheme benefits Saturday-observing religions (Seventh-Day Br. 7). That contention is refuted by Senator Randolph’s announced objective—to counteract the “dwindling of the membership of *some* . . . religious organizations,” i.e., those espousing Saturday worship. 118 Cong. Rec. 705; Pet. Br. 22 (emphasis supplied). The contention is further belied by the record in this case, which shows that Cummins’ pastor regarded his parishioner’s Saturday church attendance as “important to the congregation” and “serv[ing]” to strengthen [his] church” (R. 45).

land Bd. of Public Works, supra, at —, 96 S. Ct., at 2349; *Meek v. Pittenger*, 421 U.S. 349, 366 (1975); *Hunt v. McNair*, 413 U.S. 734, 743 (1973). Moreover, the contention is belied by the same evidence which points to the forbidden primary effect of this legislation: its benefits extend not only to individual religionists, but to groups as well—in the words of the court of appeals below, to the “*churches* holding services on Saturdays [which] may enjoy a somewhat larger attendance with a correspondingly fuller collection plate.” 516 F.2d, at 553 (Pet. 36a) (emphasis supplied).¹⁰

3. *The statutory scheme risks forbidden entanglement.* Cummins asserts that the “religious accommodation” scheme passes muster under the third branch of the tripartite test because the Government is not subject to “active involvement” in religious activity (Resp. Br. 19). But the school-aid cases demonstrate

¹⁰ The Court is urged to distinguish its school-aid decisions on the ground that this is not a case of “massive subsidy” (COLPA Br. 20). The same point was pressed by the court below when it stressed the absence of direct “financial support . . . for religious institutions,” 516 F.2d, at 553 (Pet. 36a). But as we previously noted (Pet. Br. 28, n.17), this Court’s past decisions forbid “subtle departures from neutrality, . . . as well as obvious abuses,” *Gillette v. United States*, 401 U.S. 437, 452 (1971); *See Walz v. Tax Commission*, 397 U.S., at 696 (opinion of Harlan, J.). They proscribe non-financial governmental sponsorship as well as direct subsidies. *Committee for Public Educ. v. Nyquist*, 413 U.S. 756, 772 (1973).

To like effect is the argument of one *amicus* that the school-aid cases differ because “those decisions forbid the state to pay for educational services which it may itself not constitutionally furnish,” whereas here the employer is not statutorily compelled to pay for services which the employee feels he may not furnish, because of his religious convictions (Synagogue Council Br. 14-15). This argument founders on its reading of the “accommodation” statute: a unilateral cut in pay for a salaried employee presumably offends the statutory policy as much as an outright discharge.

that the absence of direct state participation in religious institutions does not end the matter; on-going state inquiry to confirm the non-sectarian nature of the funded activity can lead to the forbidden result. See *Meek v. Pittenger*, 421 U.S., at 369-72 (plurality opinion); *Lemon v. Kurtzman*, 403 U.S. 602, 618-19 (1971). Here the "surveillance of . . . religious institutions by the state," which one *amicus* asserts is entirely absent (Seventh-Day Br. 8) and another soothingly assures will be "quick and nonjudgmental" (U.S. Br. 49), in fact pervades the statutory scheme: Such surveillance is necessarily presented on each occasion that the EEOC or a federal court is called upon to assess the religious nature of the activity for which an employment preference is demanded by the complaining employee. It merits emphasis that the statutory amendment shelters not only religious belief, but "all aspects of religious observance and practice" as well. 42 U.S.C. § 2000e(j). Presumably, this encompasses more than attendance at church services. Unless the administrative agency and the judiciary are simply to take the word of the church at face value,¹¹ the Government will be thrust into the determination whether "observance and practice" include such church-related functions as vestry meetings, church fund-raisers, or (as is reflected in the record of this case), youth activities in which Cummins engaged (R. 42).

Likewise, the searching inquiry into the *bona fides* of the employee's professed religious belief which is mandated under the "accommodation" scheme cannot be lightly dismissed. As we have explained above, such

¹¹ Cf. *Serbian Eastern Orthodox Diocese v. Milivojevich*, — U.S. —, —, 96 S. Ct. 2372, 2380-83 (June 21, 1976) (No. 75-292).

inquiry in other contexts (notably the draft-law cases) has been justified only because of the constraints which are placed upon governmental action by the free exercise clause (see *supra*, at 13-14).

CONCLUSION

For the foregoing reasons, Parker Seal Company, the petitioner, respectfully submits that this Court should reverse the judgment of the court of appeals below, and should remand the cause with instructions to reinstate the judgment of the district court dismissing Cummins' complaint.

Respectfully submitted,

PATRICK F. J. MACRORY

LEONARD H. BECKER

PAUL S. RYERSON

1229 Nineteenth Street, N.W.
Washington, D.C. 20036

—and—

BENNETT CLARK

1000 First Security Plaza
Lexington, Kentucky 40507

*Attorneys for Petitioner
Parker Seal Company*

Of Counsel:

ARNOLD & PORTER

1229 Nineteenth Street, N.W.
Washington, D.C. 20036

STOLL, KEENON & PARK

1000 First Security Plaza
Lexington, Kentucky 40507

October 4, 1976

FOR ARGUMENT

No. 75-476

SEP 23 1979

OCTOBER TERM, 1979

PAPERBEE SEAL COMPANY, PETITIONER

v.

PAUL CUMMINS

ON WRIT OF HABEAS CORPUS TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE NATIONAL EMPLOY-
MENT OPPORTUNITY COMMISSION AS AMICI CURIAE

ROBERT E. BORN

Solicitor General

J. STANLEY BENTLEY

Assistant Attorney General

LAWRENCE A. WALLACE

Deputy Solicitor General

MARK E. EVANS

Assistant to the Solicitor General

ERIK H. LARSEN

DEWITT J. DUNN

JOHN E. HARRISON

Attorneys

Department of Justice
Washington, D.C. 20530

ARTHUR W. BIRCH

General Counsel

JOHN F. WILSON

Associate General Counsel

KEATON BOSTON

CHARLES J. BROWN

LYNN ALEXANDER FRASER

GERALD R. LEVIN

Attorneys

Equal Employment Opportunity Commission
Washington, D.C. 20506

INDEX

	Page
Questions presented.....	1
Interest of the United States and the Equal Employment Opportunity Commission.....	2
Statement	3
Introduction and summary of argument.....	10
Argument	16
I. Parker Seal has not demonstrated that it is unable reasonably to accommo- date respondent's religious practice without undue hardship on the con- duct of its business.....	16
II. The reasonable accommodation re- quirement does not violate the Es- tablishment Clause of the First Amendment	25
A. The acknowledged power of Congress, consistent with the First Amendment, to pro- hibit religiously discrimina- tory employment practices by private employers com- prehends the authority rea- sonably to define the conduct that constitutes such discrim- ination	25
B. The reasonable accommodation provision properly protects individuals from the imposi- tion of unnecessary employ-	

(I)

Argument—Continued

II. The reasonable, etc.—Continued

B. The reasonable, etc.—Continued	
ment barriers that would otherwise burden the exercise of their religion; it requires nothing more than neutrality in the face of religious differences	31
C. The reasonable accommodation provision reflects a clearly secular purpose, has a primary effect that neither advances nor inhibits religion, and avoids excessive government entanglement with religion	38
Conclusion	50

CITATIONS

Cases:

<i>Bradley v. Richmond School Board</i> , 416 U.S. 696	11
<i>Braunfeld v. Brown</i> , 366 U.S. 599	33, 34, 42, 44
<i>Claybaugh v. Pacific Northwest Bell Tel. Co.</i> , 355 F. Supp. 1	24
<i>Committee for Public Education v. Nyquist</i> , 413 U.S. 756	9, 39, 42, 44
<i>Cooper v. General Dynamics, Convair Aerospace Div.</i> , 533 F. 2d 163	24-25
<i>Cort v. Ash</i> , 422 U.S. 66	12
<i>Dawson v. Mizell</i> , 325 F. Supp. 511	49
<i>Dewey v Reynolds Metals Co.</i> , 429 F. 2d 324, affirmed, 402 U.S. 689	3, 40-41, 49
<i>Dixon v. Omaha Public Power District</i> , 375 F. Supp. 1382	24

Cases—Continued

<i>Draper v. U.S. Pipe & Foundry Co.</i> , 527 F. 2d 515	20, 24, 25
<i>Everson v. Board of Education</i> , 330 U.S. 1	47
<i>Gallagher v. Crown Kosher Super Market</i> , 366 U.S. 617	37
<i>Gillette v. United States</i> , 401 U.S. 437	37, 38, 45, 46
<i>Griggs v. Duke Power Co.</i> , 401 U.S. 424	15, 16, 26, 28, 29, 39, 43, 46
<i>Hardison v. Trans World Airlines, Inc.</i> , 527 F. 2d 33, pending on petition for a writ of certiorari, No. 75-1126	20, 25
<i>Heart of Atlanta Motel, Inc. v. United States</i> , 379 U.S. 241	26
<i>Jackson v. Veri Fresh Poultry Co.</i> , 304 F. Supp. 1276	49
<i>Johnson v. United States Postal Service</i> , 497 F. 2d 128	24
<i>Katzenbach v. McClung</i> , 379 U.S. 294	26
<i>Lemon v. Kurtzman</i> , 403 U.S. 602	48
<i>McGowan v. Maryland</i> , 366 U.S. 420	34, 44
<i>Meek v. Pittenger</i> , 421 U.S. 349	39
<i>Reid v. Memphis Publishing Co.</i> , 468 F. 2d 346	49
<i>Riley v. Bendix Corp.</i> , 464 F. 2d 1113	49
<i>Roemer v. Maryland Public Works Bd.</i> , No. 74-730, decided June 21, 1976	49
<i>Schooner Peggy, The</i> , 1 Cranch 103	12
<i>Selective Draft Law Cases</i> , 245 U.S. 366	37
<i>Shaffield v. Northrop Worldwide Aircraft Services, Inc.</i> , 373 F. Supp. 937	25
<i>Sherbert v. Verner</i> , 374 U.S. 398	14, 32, 34, 36, 37, 44

Cases—Continued	Page
<i>Thorpe v. Housing Authority of the City of Durham</i> , 393 U.S. 268-----	12
<i>United States v. Seeger</i> , 380 U.S. 163-----	45
<i>Walz v. Tax Commission</i> , 397 U.S. 664-----	38
<i>Welsh v. United States</i> , 398 U.S. 333-----	37, 45
<i>Wisconsin v. Yoder</i> , 406 U.S. 205---	34, 45, 47, 49
<i>Yott v. North American Rockwell Corp.</i> , 501 F. 2d 398-----	25
<i>Zorach v. Clauson</i> , 343 U.S. 306-----	14, 36, 38, 44, 45, 47
Constitution, statutes and regulations:	
United States Constitution, First Amend- ment -----	<i>passim</i>
Civil Rights Act of 1964, 78 Stat. 241, 42 U.S.C. 2000a <i>et seq.</i> :	
Title II, Sections 201 <i>et seq.</i> , 42 U.S.C. 2000a <i>et seq.</i> -----	2
Title III, Sections 301 <i>et seq.</i> , 42 U.S.C. 2000b <i>et seq.</i> -----	2
Title IV, Section 407, 42 U.S.C. 2000c-6 -----	2
Title VII, and as added and amended by the Equal Employment Oppor- tunity Act of 1972, 86 Stat 103, 42 U.S.C. (Supp. V) 2000e <i>et seq.</i> ----	<i>passim</i>
Section 701(j), 42 U.S.C. (Supp. V) 2000e(j)-----	11, 12, 30, 40, 42, 49
Section 703(a)(1), 42 U.S.C. 2000e-2(a)(1) -----	10, 26
18 U.S.C. 245-----	2
42 U.S.C. 3601 <i>et seq.</i> -----	2
5 C.F.R. 713.204(g)-----	3
29 C.F.R. 1605.1(b)-----	11
41 C.F.R. 60-50.3-----	3

Miscellaneous:	Page
110 Cong. Rec. (1964):	
p. 1528-----	26
pp. 7207-7212-----	26
118 Cong. Rec. (1972):	
p. 705-----	40, 41
pp. 705-706-----	40
p. 706-----	40, 41, 43
pp. 706-730-----	41
Executive Order 11246, 30 Fed. Reg. 12319 -----	3

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-478

PARKER SEAL COMPANY, PETITIONER

v.

PAUL CUMMINS

*ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT*

**BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOY-
MENT OPPORTUNITY COMMISSION AS AMICI CURIAE**

QUESTIONS PRESENTED

Title VII of the Civil Rights Act of 1964 and Equal Employment Opportunity Commission Guidelines prohibit the discharge of an employee because of his religious observance or practice, unless the employer is unable reasonably to accommodate the employee's religious observance or practice without undue hardship on the conduct of the employer's business. Petitioner discharged respondent because of his religious practice

of declining to work on Saturdays. The questions presented are:

1. Whether petitioner demonstrated an inability reasonably to accommodate respondent's religious practice without undue hardship on the conduct of its business.

2. Whether the statute and guidelines violate the Establishment Clause of the First Amendment.

INTEREST OF THE UNITED STATES AND THE EQUAL
EMPLOYMENT OPPORTUNITY COMMISSION

Pursuant to Title VII of the Civil Rights Act of 1964, the Attorney General and the Equal Employment Opportunity Commission have responsibility for enforcement of federal laws providing for equal employment opportunity. Although this action was brought by a private plaintiff, the issues raised are similar to those arising in suits brought by the government. The resolution of the issues presented in this case will directly affect the government's enforcement responsibilities.

The Attorney General also has responsibility for enforcement of a variety of other federal laws proscribing discrimination on account of religion, including those requiring nondiscrimination in housing (42 U.S.C. 3601 *et seq.*), public accommodations (42 U.S.C. 2000a *et seq.*), public facilities (42 U.S.C. 2000b *et seq.*), public education (42 U.S.C. 2000c-6), and certain other federally protected activities (18 U.S.C. 245).¹

¹ In addition, Civil Service Commission Regulations on Equal Opportunity require federal agencies to make reasonable accom-

Pursuant to this interest, the United States participated as *amicus curiae* in this Court in *Dewey v. Reynolds Metals Co.*, 402 U.S. 689, affirming by an equally divided Court 429 F. 2d 324 (C.A. 6), which also involved the validity of an employee's discharge because of his religious observance or practice.

STATEMENT

1. Petitioner Parker Seal Company operates a factory in Berea, Kentucky, that produces rubber products (A. 57). Respondent Paul Cummins was hired as a "production scheduler" at this plant in 1958 (A. 53) and was made supervisor of the first shift of the plant's Banbury Department in 1965 (A. 55).

The Berea plant's standard work week is from Monday through Friday (A. 135). The plant is ordinarily closed Sundays (A. 135) but operates about half the Saturdays in a year (A. 132, 173, 198). Parker Seal employs about 600 persons at the plant (A. 132), 17 of whom are department supervisors (A. 186).

The Banbury Department mixes the rubber that Parker Seal uses for its products (A. 57, 189-190). It

modations to the religious needs of applicants and employees, including those who observe the Sabbath on days other than Sunday, when accommodation can be made without undue hardship on the business of the agency. See 5 C.F.R. 713.204(g). Guidelines issued pursuant to Executive Order 11246 by the Office of Federal Contract Compliance of the Department of Labor similarly require contractors and subcontractors with the federal government, and contractors and subcontractors on federally assisted construction contracts, to make reasonable accommodations to the religious observances and practices of employees and prospective employees. 41 C.F.R. 60-50.3.

is connected by a sliding door to the Stock Preparation Department (A. 82). The Stock Preparation Department usually operates three shifts per day; Banbury ordinarily operates two shifts per day and occasionally a third (A. 56-57, 117-118). The Stock Preparation Department has a supervisor for each of its three shifts, but the Banbury Department has a supervisor for only its first shift (A. 57, 67, 117). Supervisors of the second and third shifts of the Stock Preparation Department also oversee the operations of the corresponding Banbury shifts (A. 57, 117). In addition, company policy requires the Stock Preparation supervisor to oversee the operations of the first Banbury shift in the absence of the Banbury supervisor (A. 117). With few exceptions, whenever the Banbury Department operates on a Saturday, the Stock Preparation Department operates as well (A. 93-94, 134).

As the supervisor of the Banbury Department, Cummins was paid a fixed salary, not an hourly wage (A. 77-78). His position was not subject to the union collective bargaining agreement that applied to Parker Seal employees who were paid by the hour (A. 79, 104-105). Cummins was a member of Parker Seal's "Cost Goal Program," an incentive program whose members were expected to exercise initiative to increase company profits (A. 80, 211-214).

Cummins became a member of the World Wide Church of God in September 1970 (A. 37, 61). The Church requires its members to refrain from working from sundown Friday to sundown Saturday (A. 37-

38, 65) and on "seven * * * annual holy days * * * that are basically the same as the Jewish holy days" (A. 39).

When respondent first began attending the Church's Saturday services in April or May 1969 (A. 39, 61), he was permitted to leave the plant early on Saturdays to attend the services (A. 62, 114, 121). In July 1970, however, shortly before he became a Church member, respondent decided that he could no longer work at all on Saturdays (A. 64). He informed Conley Saylor, Plant Manager at the time, that he would no longer be available for work on Saturdays and Church holy days but would be available to work at "any other time" (A. 64-65, 115). Cummins told Saylor that he "could name the hours or the time, what he wanted me to do and I would be glad to take care of that" (A. 65). A few days later, Saylor informed Cummins that he would be allowed to observe his Sabbath (A. 66, 115). From that time on, Cummins did not work on Saturdays or the holy days of the Church (A. 66-67).

To compensate for respondent's absence on Saturdays, Saylor directed Chester Webb, supervisor of the first shift of the Stock Preparation Department, and another supervisor to "cover" the Banbury Department (A. 116-117, 150-151). This entailed checking the Banbury Department to ensure that the employees were working and the machinery was operating (A. 103, 152). Webb was the supervisor most often required to cover for Cummins (A. 69, 151). Cummins cooperated in this accommodation by preparing

Saturday production schedules in advance so that the Banbury Department could function properly in his absence (A. 99, 105-106).

Because of economic problems at the Berea plant, L. G. Haddock replaced Saylor as Plant Manager in November 1970 (A. 172-173, 208-210). The profits of the Division that included the Berea plant had begun to decline in 1968 and reached a low in early 1970 (A. 207). In October 1970 Parker Seal laid off a large number of employees (A. 208). The economic problems at the Berea plant were caused by a decline in the national economy and deteriorating morale at the plant that affected production (A. 209). The substitution of Haddock for Saylor as Plant Manager was part of an effort by Parker Seal to improve the efficiency of the Berea plant. The productivity of the Banbury Department was significantly increased by changes subsequently made in its production methods (A. 218-219, 221-222).

Upon assuming his duties as Berea Plant Manager, Haddock was instructed to insist upon more involvement by the supervisors in plant operations (A. 210). Haddock informed Cummins that he would be allowed to continue to observe his Sabbath as long as his absence did not cause any problems (A. 69). This accommodation continued without difficulty until the latter part of the summer of 1971 (A. 71, 175).

During a four-week period in July and August 1971, at least one of the three Stock Preparation Department supervisors was scheduled to be on vacation (A. 176). The company issued a notice requiring the

two remaining Stock Preparation supervisors to work 12 hours per day during this period and indicating that Cummins was to act as a substitute for these supervisors (A. 154, 185). Haddock informed Cummins that this notice meant he was expected to volunteer to work four hours in the evening for the Stock Preparation supervisors during this period (A. 68, 185-186). Cummins notified the three Stock Preparation supervisors that he would work for them in the evenings, and he substituted for them on several occasions (A. 67-68, 141-142, 153, 155).

During the vacation period, two of the Stock Preparation supervisors complained to plant officials about Cummins's not working on Saturdays (A. 177, 186, 204). Chester Webb, the supervisor for the first shift of the Stock Preparation Department, complained about having to work for Cummins on Saturdays when the Banbury Department was operating and the Stock Preparation Department was not (A. 152-153). Oscar Fain, respondent's brother-in-law and supervisor of the third shift of the Stock Preparation Department, complained about having to work 70 hours per week while respondent worked only 40 (A. 144-145, 187-188).

Because of these complaints, Haddock asked Cummins in late August if there was any possibility he would change his religious beliefs (A. 71, 178). Cummins replied that his religious beliefs were firm (A. 71-72, 178). Without further discussion, Haddock fired Cummins shortly thereafter, on September 3, 1971 (A. 72, 178).

2. Cummins filed complaints of religious discrimination with the Equal Employment Opportunity Commission and the Kentucky Commission on Human Rights. The Kentucky Commission held an evidentiary hearing in March 1972 (A. 21-241). It dismissed Cummins's charge in April 1972, holding that Parker Seal could not have accommodated respondent's religious needs without imposing an undue hardship on the conduct of its business (Pet. App. 1a-6a). Cummins did not appeal from the dismissal (Pet. App. 8a).

Cummins was thereafter issued a right-to-sue letter by EEOC; he filed this action in September 1972 in the United States District Court for the Eastern District of Kentucky (A. 1-5). The parties stipulated that the transcript of the Kentucky Commission hearing would serve as the factual record in the district court (Pet. App. 15a). In a brief opinion issued in March 1974, the district court ruled that Parker Seal was justified in discharging Cummins, holding that the company had reasonably accommodated his religious needs and that further accommodation could not have been made without undue hardship (Pet. App. 7a-9a).

3. The court of appeals reversed. It noted that the district court "did not specify what 'undue hardship' would have resulted [from continued accommodation of respondent's religious practices] and did not explain why an accommodation that was reasonable for over a year * * * suddenly became unreasonable in September 1971" (Pet. App. 20a). After a detailed review of the evidence, the court of appeals deter-

mined that the major reason for respondent's discharge was that his "fellow supervisors resented having to work on Saturdays while [respondent] was not forced to do so" (Pet. App. 28a). Although the court recognized that "employee morale problems could become so acute that they would constitute an undue hardship" (Pet. App. 29a), it characterized the supervisors' complaints in this case as "mild and infrequent" and found that Parker Seal "might have alleviated at least some of the dissension if it had pursued a more active course of accommodation" (*ibid.*).

The court concluded that Parker Seal "did not reasonably accommodate [respondent's] religious practices and * * * has not shown that such an accommodation would have imposed an undue hardship on the conduct of its business" (Pet. App. 30a-31a). It accordingly held that, by discharging Cummins, the company "discriminated against him on the basis of his religion in violation of Title VII" (Pet. App. 31a).

The court also ruled that the reasonable accommodation requirement does not violate the Establishment Clause of the First Amendment (Pet. App. 31a-40a). The court applied the three-part test established by this Court in *Committee for Public Education v. Nyquist*, 413 U.S. 756, for determining whether a law violates the Establishment Clause (Pet. App. 32a-33a). Under that test, in order to comply with the Establishment Clause a law must reflect a clearly secular purpose, must have a primary effect that neither

advances nor inhibits religion, and must avoid excessive government entanglement with religion (413 U.S. at 772-773).

The court of appeals held that the reasonable accommodation rule is supported by an adequate secular purpose because, "like Title VII as a whole, [it] was intended to prevent discrimination in employment" (Pet. App. 33a). The primary effect of the rule neither advances nor inhibits religion, the court stated, because the rule "guarantees job security" by "restrain[ing] employers from enforcing uniform work rules that, although facially neutral, discriminate in effect against employees holding certain religious convictions" (Pet. App. 36a). The court held that the rule avoids excessive government entanglement with religion since it "require[s] little or no contact between religious institutions and governmental entities" (Pet. App. 38a).

The court remanded the case to the district court for a determination of appropriate relief, noting that the district court should consider reinstatement, back pay, and attorney's fees (Pet. App. 40a).

Judge Celebrezze dissented on the ground that, in his view, the reasonable accommodation rule violates the Establishment Clause (Pet. App. 41a-57a).

INTRODUCTION AND SUMMARY OF ARGUMENT

Section 703(a)(1) of the Civil Rights Act of 1964, 78 Stat. 255, 42 U.S.C. 2000e-2(a)(1), provides that it is an unlawful employment practice for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any

individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's * * * religion * * *." Section 701(j) of the 1964 Act, as added by the Equal Employment Opportunity Act of 1972, 86 Stat. 103, 42 U.S.C. (Supp. V) 2000e(j), defines "religion" to include "all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business." The Equal Employment Opportunity Commission's Guidelines on Discrimination Because of Religion, in effect since 1967, embody a similar standard.²

I

The issues in this case are sharply focused. The parties do not dispute that Parker Seal discharged Cummins because of his refusal to work on Saturdays and that his refusal to work on Saturdays is a sincere "religious observance or practice" within the meaning of Section 701(j) of the Act.³ Whether Parker Seal

² The Guidelines impose on an employer the obligation "to make reasonable accommodations to the religious needs of employees and prospective employees where such accommodations can be made without undue hardship on the conduct of the employer's business." 29 C.F.R. 1605.1(b).

³ Cummins was discharged in September 1971, prior to the 1972 enactment of Section 701(j). However, the complaint in this case was filed after that section became law, and the 1967 EEOC Guidelines requiring reasonable accommodation (see note 2, *supra*) were in effect at the time of Cummins's discharge. In these

committed an unlawful employment practice—that is, whether it discharged Cummins because of his “religion”—thus turns on whether the company demonstrated that it was unable reasonably to accommodate Cummins’s Saturday absences without undue hardship in the conduct of its business.

That factual issue was, in our view, correctly resolved by the court of appeals, which concluded, after an exhaustive review of the record, that Parker Seal did not make the required showing and that its discharge of Cummins therefore violated the Act’s prohibition against religious discrimination. The court’s conclusion is fully supported by the record.

The company initially satisfied its Title VII obligations by excusing Cummins from work on Saturdays and arranging for supervisors from the adjoining Stock Preparation Department to “cover” for Cummins (who prepared his department’s Saturday work schedules in advance) by checking the Banbury Department to ensure that the men were working and the machinery was operating. A continuation of this reasonable accommodation of Cummins’s religious practices would not have imposed an undue hardship on the conduct of Parker Seal’s business.

circumstances, the constitutionality and application of both the statute and the Guidelines are properly before the Court. *Cort v. Ash*, 422 U.S. 66, 74–77; *Bradley v. Richmond School Board*, 416 U.S. 696, 711; *Thorpe v. Housing Authority of the City of Durham*, 393 U.S. 268, 281–283; *The Schooner Peggy*, 1 Cranch 103, 110. The parties do not contest the applicability of Section 701(j) (see Pet. Br. 17–18, n. 9).

Although the company was experiencing economic difficulties at its Berea plant at the time of Cummins’s dismissal, those difficulties were due in large measure to a decline in the national economy and were not related to Cummins’s absences from work because of his religion. The court of appeals correctly held that the complaints of two Stock Preparation supervisors about Cummins’s not working on Saturdays did not demonstrate that continued accommodation of his religious needs would have caused an undue hardship on Parker Seal’s business. The complaints were mild and infrequent, and they occurred during a period when the Stock Preparation supervisors were required to work extra hours at the plant because other supervisors were on vacation. Parker Seal made no effort to use other available means (such as increased substitution of Cummins for other supervisors during the week) to minimize the discontent of respondent’s fellow supervisors, but instead summarily fired him after he advised the Plant Manager that his religious beliefs were firmly fixed.

II

It follows that Cummins is entitled to appropriate relief under the Act, unless, as Parker Seal alternatively argues, the Act and the EEOC Guidelines, as interpreted by the court of appeals, violate the Establishment Clause of the First Amendment insofar as they impose on the company an obligation to make reasonable accommodations to an employee’s religious observance or practice.

A. If, as Parker Seal apparently concedes (Br. 24, 40), Congress may validly proscribe sophisticated as well as obvious means of religiously discriminatory employment practices by private employers, and if, as this Court has held, Title VII is directed to the consequences and not merely the motivation of employment practices, then it follows that the reasonable accommodation requirement does not violate the Establishment Clause. For it does no more than state a standard by which to determine whether, in a particular case, an employment practice with religiously discriminatory consequences is justified by substantial business need. An employer's obligation to accommodate his employees' religious needs derives from his basic obligation to avoid religious discrimination in employment.

B. This Court's Establishment Clause decisions make clear that a government employer could properly make reasonable accommodations to those of its employees whose religious beliefs or observances conflict with normal work schedules, even if the schedules of other employees might have to be adjusted as a consequence. That would reflect a permissible "neutrality in the face of religious differences" and would not "serve to abridge any other person's religious liberties" (*Sherbert v. Verner*, 374 U.S. 398, 409). It is not an establishment of religion for public institutions to make "adjustments of their schedules to accommodate the religious needs of the people" (*Zorach v. Clauson*, 343 U.S. 306, 315). It is no more an establishment of religion for the government to require pri-

vate employers to do the same thing. In neither case is there any departure from the principle of neutrality. Congress may validly seek to accommodate free exercise values by eliminating unnecessary burdens on the practice of religion and avoidable clashes with the dictates of conscience.

C. The reasonable accommodation requirement satisfies the tripartite test devised by this Court for determining whether a challenged law violates the Establishment Clause: it reflects a clearly secular purpose, it has a primary effect that neither advances nor inhibits religion, and it avoids excessive government entanglement with religion.

The purpose and effect of the reasonable accommodation requirement are the same as those of Title VII as a whole—"to achieve equality of employment opportunities" and to "remov[e] * * * artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of * * * impermissible" criteria. *Griggs v. Duke Power Co.*, 401 U.S. 424, 429, 431. Congress has properly determined that an individual's religion, as well as his race, nationality, and sex, should not affect his employment opportunities except in the rare instance when it significantly affects his job qualifications. The reasonable accommodation requirement represents a permissible legislative effort—clearly secular in purpose and effect—to identify the circumstances in which it may fairly be said that an individual's religious practices are sufficiently relevant to his job qualifications that they may properly be taken into account in

connection with an employment practice. The requirement's primary effect neither advances nor inhibits religion; rather, it removes an artificial barrier to equal employment opportunity by making religion an "irrelevant" employment criterion (*Griggs, supra*, 401 U.S. at 436) except to the limited extent that a person's religious practice significantly and demonstrably affects the employer's business.

The requirement entails no substantial government entanglement with religion. The central factual inquiry under the statute—whether the employer can reasonably accommodate an employee's religious practice without undue hardship—implicates industrial, not religious, considerations, and any unavoidable "entanglement" that may occasionally result when a religion's practices or an employee's sincerity is put in issue is likely to be minimal.

In sum, the reasonable accommodation requirement itself represents a reasonable accommodation of the values embodied in the Free Exercise and Establishment Clauses. Although the legislative solution is not compelled by either clause, neither is it forbidden.

ARGUMENT

I

PARKER SEAL HAS NOT DEMONSTRATED THAT IT IS UNABLE REASONABLY TO ACCOMMODATE RESPONDENT'S RELIGIOUS PRACTICE WITHOUT UNDUE HARDSHIP ON THE CONDUCT OF ITS BUSINESS

Since the district court failed to make specific findings in support of its conclusion that Parker Seal had

shown it was unable reasonably to accommodate respondent's religious practices without undue hardship, the court of appeals undertook an independent examination of the record (Pet. App. 20a). It concluded that whatever "inconvenience" or "hardship" the company may have experienced did not amount to "undue hardship" under an appropriate interpretation of the statute and Guidelines, and that, to the extent the district court's opinion rested on a finding of "undue hardship," the finding was "clearly erroneous" (Pet. App. 30a). The court of appeals further found that Parker Seal had not taken reasonable steps available to it to minimize the inconvenience it was experiencing and thereby to accommodate respondent's Saturday absences (Pet. App. 29a-30a). In our view, the court's rulings are correct.

1. For more than a year—from July 1970 to September 1971—Parker Seal reasonably accommodated respondent's religious practices by excusing him from work on Saturdays and arranging for supervisors of the adjacent Stock Preparation Department to oversee the Banbury operation in his absence. That oversight entailed no substantial burden. The Stock Preparation supervisors merely checked the Banbury Department to ensure that the employees were working and the machinery was operating (A. 103, 152).

This was not an extraordinary departure from usual operating procedures. Even before Cummins became a member of the World Wide Church of God, it had been company policy to have the Stock Preparation supervisors cover for the Banbury supervisor on the

plant's second and third shifts and at other times when the Banbury supervisor was absent (A. 117, 130).

Nor is there any evidence showing that the procedure adversely affected the plant's efficiency. Cummins cooperated in the procedure by preparing Saturday work schedules in advance (A. 89, 99, 105-106), and he testified that, with proper scheduling, the Banbury Department could be run with equal efficiency in his absence (A. 89). The Banbury workers were well trained and knew that Cummins could determine from graphs and charts whether they had worked up to capacity in his absence (A. 103). The former Plant Manager testified that respondent's Saturday absences did not affect the efficiency or productivity of the Banbury operation (A. 131).⁴ Similarly, although there was always a possibility that an accident could occur in the department as a result of a mechanical breakdown, the presence or absence of the Banbury supervisor would not affect that possibility (A. 89).

In sum, the company's accommodation of respondent's religious practices placed no "unreasonable strain on its business" (Pet. App. 30a).

2. The court of appeals found—and the company does not contest the finding—that "the major reason

⁴ Although the succeeding Plant Manager (the one who discharged Cummins) stated that Cummins "had to be there if that department was to function the way it should" (A. 180), he was unable to say, without "look[ing] at my figures," whether respondent's Saturday absences resulted in reduced efficiency for the Banbury Department (A. 189-190). The record does not indicate what those figures would have reflected.

for [respondent's] discharge" was that his "fellow supervisors resented having to work on Saturdays while [Cummins] was not forced to do so" (Pet. App. 28a). If Parker Seal had shown that its accommodation of respondent's Saturday absences had caused "a serious morale problem" (Pet. Br. 51) that significantly affected the plant's operation and that could not reasonably have been rectified by means other than discharging Cummins, then the company might well have met its burden of showing "undue hardship." The record here, however, fully supports the court of appeals' determination that Parker Seal's "employee morale problems" were not nearly "so acute that they would constitute an undue hardship" (Pet. App. 29a).

Respondent's discharge was precipitated by the complaints of only two of the plant's 17 supervisors. Chester Webb complained that he was the only supervisor required to substitute for Cummins on Saturdays when the Banbury Department was operating and the Stock Preparation Department was not (A. 152-153). That occurred only a few times a year (A. 69, 93-94, 134). Webb apparently did not object to covering the Banbury Department for Cummins on those Saturdays when both the Stock Preparation and Banbury Departments were operating (A. 153).

Oscar Fain, the other complaining supervisor, objected to working 70 hours per week in July and August 1971 when Cummins allegedly was working

only 40 hours but earning more money (A. 187-188).⁶ The Plant Manager testified that Fain's dissatisfaction was due in part to the fact that he had recently been made an "exempt employee," a status that entitled him to a higher base pay but made him ineligible to draw overtime wages (A. 188).

These complaints—correctly characterized by the court of appeals as "both mild and infrequent" (Pet. App. 29a)—do not signify a "smoldering resentment among Cummins' fellow supervisors" (Pet. Br. 9) and do not amount to an "undue hardship." See *Draper v. U.S. Pipe & Foundry Co.*, 527 F. 2d 515 (C.A. 6); *Hardison v. Trans World Airlines, Inc.*, 527 F. 2d 33 (C.A. 8), pending on petition for a writ of certiorari, No. 75-1126.

The complaints apparently grew out of a temporary situation in which a combination of scheduled vacations and heavy production requirements resulted in extraordinary burdens upon supervisory employees (A. 176-177). Those burdens might well have produced similar complaints even if Cummins had been working on Saturdays. They would have subsided in any event when all three Stock Preparation supervisors were again available for work—so that each would be required to work only 48, instead of 72, hours per week.

Furthermore, as the court of appeals correctly found (Pet. App. 29a-30a), Parker Seal could have

⁶ The record suggests that Cummins was in fact working more than 40 hours per week during this period, filling in for other supervisors who were on vacation or who needed relief (A. 67-68, 141, 155).

taken reasonable steps to prevent or alleviate at least some of the dissatisfaction expressed by Webb and Fain. It would have been simple, fair, and fully consistent with Title VII to require Cummins to work extra hours at the Stock Preparation Department during the summer vacation period of July and August 1971, when the Stock Preparation supervisors were working as many as 72 hours per week. If Cummins had been assigned an additional 16 hours per week, for example, the overtime burdens on the other supervisors could have been substantially reduced.

The Plant Manager admitted that the temporary overtime problem would have been alleviated if Cummins had worked additional hours, but he considered it preferable to rely on a voluntary arrangement (A. 184-186, 202-203). Although Cummins repeatedly offered to substitute for the Stock Preparation supervisors (A. 67-68, 141-142, 153) and in fact did substitute for them on several occasions (A. 67-68, 141, 153, 155), the voluntary arrangement did not fully succeed. At least one of the supervisors was reluctant to accept respondent's offer to substitute because he thought that it was not "my place to tell [Cummins] to work for me" (A. 141); the supervisor believed that the Plant Manager should have made the work assignment (A. 142).

Even apart from the extraordinary situation in the summer of 1971, the company could easily have assigned Cummins to additional hours of work during the week on a permanent basis to compensate for his Saturday absences. Since the Stock Preparation

supervisors who covered for Cummins on Saturdays could thereby have been relieved of some work obligations during the week, it is reasonable to suppose that the arrangement would have allowed Cummins to observe his Sabbath without causing significant discontent among the other supervisors. Nothing in the record suggests that an equitable arrangement of this sort was even considered by the company, much less that it could not be implemented without undue hardship.⁶

The record is also silent on whether the company could have assigned supervisors from outside the Stock Preparation Department to cover the Banbury Department on the few Saturdays when Banbury was operating and Stock Preparation was not.⁷ If so, Chester Webb's complaint (p. 19, *supra*) might have been eliminated.

3. Parker Seal suggests, without actually asserting, that the company's accommodation of respondent's

⁶ Plant Manager Haddock testified that during the week, when the Banbury Department was operating, "I would gain nothing by pulling [Cummins] out of there and putting him in Stock Prep" (A. 198). But that does not answer our point. The fact that Cummins could not be used more effectively as a substitute during his normal working hours does not mean that he could not relieve the Stock Preparation supervisors by working additional hours, before or after his normal shift, each day of the week except Saturday. That arrangement would have allowed Cummins to make up during the week the time that he took off on Saturdays and would have compensated the Stock Preparation supervisors for their extra duties in covering for Cummins on Saturdays.

⁷ Since Cummins prepared the Saturday work schedules in advance (A. 99, 105-106), all that was required of a supervisor covering the Banbury Department on Saturday was to make sure that the men were working and that the machinery was functioning (A. 103, 152).

Saturday absences was causing undue hardship by contributing to the plant's deteriorating profitability (Br. 7-10, 43, 52). The record shows, however, that the Berea plant's financial difficulties were neither caused nor aggravated by the accommodations to Cummins.

The plant's economic decline began in late 1968 and reached a low point in 1969 or early 1970 (A. 207). Cummins did not begin observing his Sabbath by refraining from work on Saturdays until July 1970 (A. 64). The plant's problems were caused in part by a general decline in the national economy and in part by low morale and decreased output at the Berea plant (A. 209). The morale problems were caused by "a fear that the older employees were going to be replaced by people that [the company] would bring in from the outside" (A. 224)—hardly a fear to be alleviated by the firing of Cummins after 13 years of employment with the company.

The company's Division Manager testified that the low productivity of the Banbury Department was significantly improved in 1970 and 1971 through changes in production methods and because of his personal attention to the Department's operation (A. 218-219, 221, 223). Nothing in the record suggests that respondent's absence from work on Saturdays contributed to the plant's economic difficulties. Indeed, the Division Manager, whose work at the plant gave him personal knowledge of Cummins's performance as Banbury supervisor, testified that Cummins "was an interested employee and willing to co-operate"—"one of the stronger Foremen that we had" (A. 222).

4. Even if Parker Seal had demonstrated that it could not, without undue hardship, continue to accommodate Cummins's religious absences from his position in the Banbury operation, that would not by itself justify terminating his employment. If an employer is unable reasonably to accommodate an employee's religious practices in his existing position, it may be able to do so by transferring him to another position. Cf. *Draper v. U.S. Pipe & Foundry Co.*, *supra*, 527 F. 2d at 519-520; *Johnson v. United States Postal Service*, 497 F. 2d 128, 130 (C.A. 5); *Dixon v. Omaha Public Power District*, 385 F. Supp. 1382, 1386 (D. Neb.); *Claybaugh v. Pacific Northwest Bell Tel. Co.*, 355 F. Suppl. 1, 5 (D. Ore.).

No effort was made to find Cummins another position in the Parker Seal organization where his religious practices could reasonably be accommodated. The company asserts that a collective bargaining agreement prevented it from transferring Cummins to a lower grade (Br. 10 n. 5, 54). In support of its assertion, however, the company cites only Cummins's testimony that Haddock told him there were supposed to be no "downgrades" (A. 72, 99). That testimony is not proof that a collective bargaining agreement prohibited a transfer to a lower grade. Indeed, the record suggests the contrary: as a supervisor, he was not subject to the provisions of the company's collective bargaining agreement with its union (A. 79, 104-105).⁸

⁸ This case therefore does not present the question of the proper relationship between the reasonable accommodation requirement and a union collective bargaining agreement. Cf. *Cooper v. Gen-*

Moreover, even if Cummins could not have been transferred to a lower grade, there is no evidence that the company made any effort to determine the availability of other supervisory positions at Cummins's level that either did not entail Saturday work or would have been better suited to regular Saturday substitution.

We therefore conclude, on this record, that Parker Seal's discharge of Cummins violated the reasonable accommodation requirement of Title VII.

II

THE REASONABLE ACCOMMODATION REQUIREMENT DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT

A. THE ACKNOWLEDGED POWER OF CONGRESS, CONSISTENT WITH THE FIRST AMENDMENT, TO PROHIBIT RELIGIOUSLY DISCRIMINATORY EMPLOYMENT PRACTICES BY PRIVATE EMPLOYERS COMPREHENDS THE AUTHORITY REASONABLY TO DEFINE THE CONDUCT THAT CONSTITUTES SUCH DISCRIMINATION

Our Establishment Clause analysis begins with the premise—unchallenged by Parker Seal (see Br. 40)—that Title VII's basic prohibition against religiously discriminatory employment practices by private employers is a proper exercise of congressional power

eral Dynamics, Convair Aerospace Div., 533 F. 2d 163, 166-170 (C.A. 5); *Yott v. North American Rockwell Corp.*, 501 F. 2d 398, 403-404 (C.A. 9); *Draper v. U.S. Pipe & Foundry Co.*, *supra*, 527 F. 2d at 522; *Hardison v. Trans World Airlines, Inc.*, *supra*, 527 F. 2d at 42-43; *Shaffield v. Northrop Worldwide Aircraft Services, Inc.*, 373 F. Supp. 937, 942 (M.D. Ala.).

under the Commerce Clause⁹ and is not a "law respecting an establishment of religion." Parker Seal also acknowledges that Congress may validly prohibit "sophisticated as well as simple-minded modes of religious discrimination" (Br. 24). And it is settled that Title VII "proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation"; the Act's thrust is directed "to the consequences of employment practices, not simply the motivation" (*Griggs v. Duke Power Co.*, 401 U.S. 424, 431, 432; emphasis in original).

It follows, in our view, that the reasonable accommodation provision at issue here does not violate the Establishment Clause, for it does no more than define "religion" in a way reasonably calculated to ensure that even those employment practices whose religiously discriminatory consequences are subtle rather than obvious are effectively covered by the Act's basic prohibition.

Section 703(a)(1) makes it unlawful for an employer to discharge an employee "because of such individual's * * * religion." It would be the most obvious violation of that proscription were an employer to discharge an employee simply because he found the employee's religious beliefs personally repugnant. It would also be an obvious violation to base a discharge on a personal distaste for the em-

⁹ See 110 Cong. Rec. 1528, 7207-7212. Cf. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241; *Katzenbach v. McClung*, 379 U.S. 294.

ployee's religious practices, if the practices were conducted outside the employment relationship and did not affect in any way the employee's job performance. With these propositions Parker Seal would doubtless take no issue.

The inquiry becomes more difficult when the employee's religious beliefs dictate a form of observance that would interfere to some degree with the normal performance of his job duties. It seems clear enough, to take the most extreme example, that when an employee refuses to work at all because his religious beliefs forbid it, the employer's decision to discharge the employee would not constitute discrimination on the basis of the employee's religion. In that case there would be no means of accommodating the employee's religious observance while still maintaining the employment relationship.

At the other end of the spectrum are religious observances that may occasion the most insignificant interference with job performance. An employee's beliefs may require, for example, that he interrupt his work once or twice a day for a few moments of prayer or meditation. Common sense tells us that to discharge an employee because of such momentary interruptions may be viewed as having religiously discriminatory consequences, unless, in the particular employment context, even the briefest pause for meditation necessarily produces a work disruption sufficiently substantial to justify the conclusion that the employer's insistence on abandonment of the practice has "a manifest relationship to the employment in

question" (*Griggs v. Duke Power Co.*, *supra*, 401 U.S. at 432).

It is not clear to us whether Parker Seal would agree or disagree with that statement. On the one hand, the company refers with approval to decisions that seem to support the view that, at least in certain situations, an employer's refusal to accommodate an employee's religious observances during normal working hours may amount to discrimination on the basis of religion (Br. 24-25, n. 15). On the other hand, the company repeatedly asserts that an employer may not validly be compelled "to alter his practices" to accommodate an employee's "religious practices [that] conflict with job-related work schedules" (Br. 14).

Does the company mean to say that even the most insignificant "conflict" can justify a discharge and that Congress is powerless to prevent it even when only the most minimal accommodation would be required? If so, its position is untenable. For if (as Parker Seal admits) Congress may properly prohibit subtle as well as obvious religious discrimination in employment, and if (as *Griggs v. Duke Power Co.* teaches) Congress may properly focus on the discriminatory consequences of employment practices and not merely on instances of intentional discrimination, then there is no reason why its power must come to an abrupt end once it may be said that the employee's religious practices affect "job-related work schedules" (Pet. Br. 14). If the conflict between a religious observance and work schedules is minimal or can easily be avoided, Congress may validly proscribe, as reli-

giously discriminatory, a discharge or other adverse employment action on the basis of that religious observance. To deny that Congress has that power is to say that the First Amendment sanctions religious discrimination in private employment so long as the religion is manifested, no matter how insubstantially, in work-related conduct. If this is Parker Seal's position, it should be rejected.

If, instead, the company is prepared to concede that some accommodation may validly be required with respect to some religious practices, then on what basis does it challenge the formulation chosen by Congress? One may imagine a broad spectrum of work-related religious observances, from a refusal to work at all to a momentary pause for silent prayer. The legislative task is to distinguish among those practices that are, and those that are not, sufficiently disruptive of the employment relationship to warrant the employee's discharge from employment. If a practice is not sufficiently disruptive—that is, if the "conflict" of which Parker Seal speaks (Br. 14) is, in context, relatively insubstantial—then a discharge on that basis may properly be prohibited on the ground that its religiously discriminatory consequences are not justified by any substantial business need. Cf. *Griggs v. Duke Power Co.*, *supra*, 401 U.S. at 431-432.

In formulating a standard for differentiating between permissible and impermissible employment practices based on work-related religious observances, Congress drew upon the criteria of reasonableness—deeply entrenched in our legal tradition—and business

need—the “touchstone” of Title VII (*Griggs, supra*, 401 U.S. at 431). The 1972 amendment defined “religion” to include “all aspects of religious observance and practice * * * unless an employer demonstrates that he is unable to reasonably accommodate to an employee’s or prospective employee’s religious observance or practice without undue hardship on the conduct of the employer’s business.” 42 U.S.C. (Supp. V) 2000e(j).

Reasonable persons may perhaps disagree over whether this is the best formulation of the standard—or indeed over whether it was wise of Congress to legislate the standard at all (or to authorize its formulation by the Equal Employment Opportunity Commission) rather than leaving the matter for development by the courts (see Pet. Br. 24–26). But those questions are properly within the scope of congressional authority to resolve. Unless the Establishment Clause altogether bars Congress from protecting private employees from discharges based upon religious observances, even when the observances bear only insubstantially upon work performance, then Congress has the constitutional authority reasonably to determine the circumstances in which such a discharge will be permitted.

Any such determination, of course, will have the effect of imposing certain obligations on employers to adjust their practices to avoid religiously discriminatory consequences. But if, as here, the congressional standard is reasonable, the Establishment Clause is no more violated by the imposition of such an obligation

than it is by Title VII’s imposition of what Parker Seal calls “the fundamental duty to avoid [religious] discrimination in employment” (Br. 14). The obligation to accommodate is no more than a reasonable and proper application of the obligation to avoid religious discrimination in employment generally.

B. THE REASONABLE ACCOMMODATION PROVISION PROPERLY PROTECTS INDIVIDUALS FROM THE IMPOSITION OF UNNECESSARY EMPLOYMENT BARRIERS THAT WOULD OTHERWISE BURDEN THE EXERCISE OF THEIR RELIGION; IT REQUIRES NOTHING MORE THAN NEUTRALITY IN THE FACE OF RELIGIOUS DIFFERENCES

Parker Seal’s Establishment Clause argument, at bottom, is that any law requiring one individual to adjust his conduct in order to accommodate himself to another individual’s religious observances has the impermissible effect, no matter how reasonable the required accommodation may be, of establishing the religion to which the accommodation is required (see Pet. Br. 13–14, 16, 18–19 n. 10, 27–28). Title VII’s reasonable accommodation provision is invalid, according to the company’s analysis, because it compels private employers to adjust their business practices to accommodate the religious observances of their employees.

The company has cited no decision of this Court to support the proposition that any law requiring the alteration of private conduct in deference to the religious needs of others is an impermissible establishment of religion. On the contrary, the company’s analysis is incompatible with the principles of this Court’s Establishment Clause decisions.

We start with the principle that a State may—and in some cases must—exempt from the operation of a facially neutral condition or requirement persons whose sincere religious beliefs or practices would be burdened by its application to them. *Sherbert v. Verner*, 374 U.S. 398, is the most pertinent illustration of the principle. The Court there invalidated, as an unconstitutional burden on the free exercise of religion, a state law denying unemployment compensation benefits to a member of the Seventh-Day Adventist Church because of her refusal, in accordance with the tenets of her religion, to accept employment requiring Saturday work. The Court held that the State could not, consistently with the Free Exercise Clause, force a sincere Saturday Sabbatarian “to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand” (374 U.S. at 404).

Apart from its free exercise holding, the Court in *Sherbert* also considered whether the Establishment Clause barred imposing on the State the duty to exempt from its usual eligibility requirements any claimant whose unavailability for Saturday work was due to religious observance. The Court declared: “In holding as we do, plainly we are not fostering the ‘establishment’ of the Seventh-Day Adventist religion in South Carolina, for the extension of unemployment benefits to Sabbatarians in common with Sunday worshippers reflects nothing more than the governmental obligation of neutrality in the face of religious

differences, and does not represent that involvement of religious with secular institutions which it is the object of the Establishment Clause to forestall” (374 U.S. at 409).

Even the two dissenting Justices (Mr. Justice Harlan, joined by Mr. Justice White)—who objected to the Court’s free exercise holding on the ground that it would require the State to “single out for financial assistance those whose behavior is religiously motivated, even though it denies such assistance to others whose identical behavior (in this case, inability to work on Saturdays) is not religiously motivated” (374 U.S. at 422; emphasis in original)—believed that under the Establishment Clause “it would be a permissible accommodation of religion for the State, if it chose to do so, to create an exception to its eligibility requirements for persons like the appellant” (*ibid.*; emphasis in original). “The constitutional obligation of ‘neutrality,’ ” the dissenting Justices stated, “is not so narrow a channel that the slightest deviation from an absolutely straight course leads to condemnation” (*ibid.*).

Two years earlier, in *Braunfeld v. Brown*, 366 U.S. 599, the Court had upheld the constitutional validity of Pennsylvania’s Sunday closing law as applied to retail merchants whose religious beliefs—like those of Mrs. Sherbert—precluded them from working on Saturdays. Although the Court divided over whether the Free Exercise Clause required the State to exempt Saturday Sabbatarians from the operation of the Sunday closing laws, no Justice doubted that the Es-

tablishment Clause permitted a State voluntarily to provide such an exemption. Indeed, the plurality opinion, recognizing that several States had in fact taken that approach, observed that "this may well be the wiser solution to the problem" (366 U.S. at 608).¹⁰

Finally, in *Wisconsin v. Yoder*, 406 U.S. 205, the Court ruled that the Free Exercise Clause precluded the application of Wisconsin's compulsory school-attendance law to Amish parents who sincerely believed that high school attendance for their children was contrary to their religion. The Court, relying on *Sherbert*, rejected the suggestion that "recognizing an exemption for the Amish from the State's system of compulsory education constituted an impermissible establishment of religion" (406 U.S. at 234-235, n. 22). "Accommodating the religious beliefs of the Amish," the Court stated, does not "support, favor, advance, or assist the Amish," but simply "allow[s] their centuries-old religious society * * * to survive free from the heavy impediment compliance with the Wisconsin compulsory-education law would impose" (*ibid.*).

If it is not an establishment of religion for a State to pay unemployment compensation benefits to a claimant who, but for his religious beliefs and ob-

¹⁰ See also Mr. Justice Frankfurter's separate opinion, joined by Mr. Justice Harlan, in *McGowan v. Maryland*, 366 U.S. 420, 459, which applied also to *Braunfeld*: "However preferable, personally, one might deem such an exception [for Saturday Sabatarians], I cannot find that the Constitution compels it" (366 U.S. at 520).

servances, would be denied benefits, and if it is not an establishment of religion for a State to carve out an exception from its Sunday closing laws or compulsory education laws for persons who, but for their religious beliefs and observances, would be required to conform to those laws, then would it be an establishment of religion for a state, in its role as an employer, to make reasonable accommodations to those of its employees whose religious beliefs or observances conflict with normal work schedules? Would it be permissible, for example, for a State agency to excuse a Seventh-Day Adventist from regularly scheduled Saturday work if, without undue hardship to the conduct of the agency's operations, it could arrange for other employees to cover for the absent individual?

The answer, in our view, is clear. For if a State were unable to make such an accommodation, the Seventh-Day Adventist employee would be subjected to the same kind of burden on the exercise of his religion to which Mrs. Sherbert was subjected by the operation of South Carolina's eligibility requirements for unemployment compensation benefits. Like Mrs. Sherbert, the employee would be forced to "choose between following the precepts of [his] religion and forfeiting benefits [government employment], on the one hand, and abandoning one of the precepts of [his] religion in order to accept [keep] work, on the other hand" (374 U.S. at 404). Whether or not the Free Exercise Clause would require the State to relieve its employee of this burden, the Court's decisions make clear that the Establishment Clause would not pro-

hibit the State from doing so. Here, no less than in *Sherbert*, accommodating the Seventh-Day Adventist would involve nothing more than "neutrality in the face of religious differences" (*id.* at 409).

Nor would it be any more an establishment of religion because the State might have to adjust the work schedules of other employees to accommodate their colleague's Saturday absences. An adjustment of that sort would not "serve to abridge any other person's religious liberties" (*ibid.*), and, as this Court stated in *Zorach v. Clauson*, 343 U.S. 306, 315, the Establishment Clause does not mean that "public institutions can make no adjustments of their schedules to accommodate the religious needs of the people." On the contrary, the Court stated, when a State "cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs" (343 U.S. at 314).

The Court in *Zorach* upheld the validity of a public school "released time" program, even though one of the "adjustments" made necessary by the program required the teachers and students who remained in school during the "released time" period to suspend normal school activities to assure that "the nonreligious attendants [would] not forge ahead of the church-going absentees" (343 U.S. at 324; dissenting opinion of Mr. Justice Jackson). *Zorach* alone thus answers Parker Seal's contention that requiring one person to accommodate the religious observances of another is a violation of the Establishment Clause. Such a re-

quirement, if otherwise reasonable, is not an establishment of religion as long as it does "not make a religious observance compulsory" and does "not coerce anyone to attend church, to observe a religious holiday, or to take religious instruction" (343 U.S. at 314).¹¹

If, therefore, a State does not establish religion when it reasonably accommodates the religious observances of its own employees (and requires other state employees to make the necessary adjustments), we see no basis for concluding that it violates the Establishment Clause when it requires private employers to do the same thing. In neither case is there any prohibited advancement of religion or any interference with the religious liberty of others. In each, the reasonable accommodation reflects, as in *Sherbert*, "neutrality in the face of religious differences" (374 U.S. at 409). If the government may validly and neutrally relieve its own employees of a burden on the exercise of their

¹¹ Thus, a selective service law that exempts religious conscientious objectors from military conscription does not violate the Establishment Clause (*Selective Draft Law Cases*, 245 U.S. 366, 389-390; see *Welsh v. United States*, 398 U.S. 333, 369-374 (dissenting opinion); *Gillette v. United States*, 401 U.S. 437), even though that religious exemption inevitably requires some other person, in deference to the objector's religious beliefs, to adjust his own conduct to the point of entering military service in place of the objector. Similarly, a state law "forbidding certain activities to be conducted within a set distance from a place of public worship" on Sundays—a prohibition that requires a more direct, if less consequential, accommodation by private persons to the religious practices of others—was sustained by this Court in *Gallagher v. Crown Kosher Super Market*, 366 U.S. 617, 627. "[B]ecause the State wishes to protect those who do worship on Sunday does not mean that the State means to impose religious worship on all" (*ibid.*; plurality opinion).

religion, there is no Establishment Clause bar to extending the same protection to private employees.

It is irrelevant that "Parker Seal cannot be equated with a sovereign State or with the Federal Government" (Pet. Br. 39) and therefore that "the Constitution does not require [the company] to assure the free exercise of [its] employees' religions" (*id.* at 38). Congress is not forbidden to foster an environment, in private industry as well as public employment, that is hospitable to "as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary" (*Zorach v. Clauston*, *supra*, 343 U.S. at 313). Quite apart from what the Free Exercise Clause may require, "it is hardly impermissible for Congress to attempt to accommodate free exercise values, in line with 'our happy tradition' of 'avoiding unnecessary clashes with the dictates of conscience'" (*Gillette v. United States*, 401 U.S. 437, 453).

As this Court stated in *Walz v. Tax Commission*, 397 U.S. 664, 669, short of "governmentally established religion or governmental interference with religion * * * there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference." That is the aim and the effect of Title VII's reasonable accommodation requirement.

C. THE REASONABLE ACCOMMODATION PROVISION REFLECTS A CLEARLY SECULAR PURPOSE, HAS A PRIMARY EFFECT THAT NEITHER ADVANCES NOR INHIBITS RELIGION, AND AVOIDS EXCESSIVE GOVERNMENT ENTANGLEMENT WITH RELIGION

This Court has formulated, in cases involving government financial aid to religious educational institu-

tions, a three-part test to help "identify instances in which the objectives of the Establishment Clause have been impaired" (*Meek v. Pittenger*, 421 U.S. 349, 359). "[T]o pass muster under the Establishment Clause the law in question, first, must reflect a clearly secular legislative purpose, * * * second, must have a primary effect that neither advances nor inhibits religion, * * * and, third, must avoid excessive government entanglement with religion" (*Committee for Public Education v. Nyquist*, 413 U.S. 756, 773).

This case, of course, involves no financial support to any religious institution—one of the principal "evils against which the Establishment Clause protects" (*Meek v. Pittenger*, *supra*, 421 U.S. at 359)—and there may accordingly be room to argue that a less rigorous test should be applied. We do not advance such an argument, however, because the statutory provision at issue in this case so plainly satisfies each element of the three-part test.

1. The reasonable accommodation provision challenged by Parker Seal serves the same "clearly secular legislative purpose" (*Committee for Public Education v. Nyquist*, *supra*, 413 U.S. at 773) as that served by Title VII generally—"to achieve equality of employment opportunities" by "remov[ing] * * * artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification" (*Griggs v. Duke Power Co.*, *supra*, 401 U.S. at 429, 431). Congress has properly determined that an individual's employment opportunities should depend

solely upon job qualifications and that one's religion—as well as one's race, nationality, and sex—should not be permitted to affect those opportunities except in the rare instance when it bears significantly on the question of job qualifications. The reasonable accommodation provision (Section 701(j) of the Act) represents a permissible legislative effort—plainly secular in purpose—to identify the circumstances in which it may fairly be said that an individual's religious practices are sufficiently relevant to his job qualifications that they may properly be taken into account in connection with an employment decision.

This secular purpose is reflected in the provision's legislative history. Section 701(j) was added in 1972 by a Senate floor amendment to the Equal Employment Opportunity Act of 1972, 86 Stat. 103. Senator Randolph, who proposed the amendment, stated that it was intended to further Title VII's guarantee of "freedom from religious discrimination in the employment of workers" and "to resolve by legislation—and in a way I think was originally intended by the [1964] Civil Rights Act—[an issue] which the courts apparently have not resolved" (118 Cong. Rec. 705, 706). That issue was the extent to which Title VII's ban on religious discrimination limited an employer's freedom to discharge or refuse to hire an individual whose religious practices or observances conflicted with the employer's work schedules. Senator Randolph referred (18 Cong. Rec. 705-706) to *Dewey v. Reynolds Metals Co.*, 402 U.S. 689, which had affirmed by an equally divided Court a Sixth Circuit decision

(429 F. 2d 324) sustaining the lawfulness of an employer's discharge of an employee who refused for religious reasons to work on Sundays.¹²

Senator Randolph's remarks included an expression of special concern about the dwindling membership of some Sabbatarian sects (118 Cong. Rec. 705), but the overriding theme of his observations was that the amendment was needed to eliminate "religious discrimination in * * * employment" (*ibid.*), and he agreed with Senator Dominick that the provision would protect the equal employment opportunities, not only of Sabbatarians, but also the members of any "other religious sect which has a different method of conducting their lives than do most Americans" (*id.* at 706). The aim was not to advance religion but rather, in "the spirit of religious freedom" (*ibid.*), to ensure that no individual's religious practices would needlessly restrict his work opportunities. That is a valid secular objective fully in accord with the purposes of Title VII as a whole.

That a law may, in the minds of some legislators, have a religious purpose in addition to a proper secular purpose does not, under this Court's decisions, render it invalid under the Establishment Clause. The Court's test requires only that a law reflect a valid

¹² Senator Randolph inserted into the Congressional Record the Sixth Circuit's opinion and this Court's order of affirmance in *Dewey*, a district court opinion in a similar case, and the Equal Employment Opportunity Commission's 1967 Guidelines on Discrimination Because of Religion (which imposed a reasonable accommodation requirement nearly identical to that proposed by Senator Randolph) (118 Cong. Rec. 706-730).

secular purpose. It does not mean that the law must be devoid of all religious purpose whatsoever.¹³

Furthermore, while one of Senator Randolph's purposes in proposing his amendment may have been to prevent the dwindling of the membership rolls of some religious groups, that is not, in the context of his specific proposal, a purpose to advance religion. Rather, his amendment's purpose was to assure that no individual of any faith will needlessly be required "to choose between his religious faith and his economic survival" (*Braunfeld v. Brown, supra*, 366 U.S. at 616) (Stewart, J., dissenting)—thereby necessarily also protecting religious institutions from the adverse consequences of religiously discriminatory employment practices. That is an entirely legitimate legislative objective.

We accordingly conclude that Section 701(j) "is adequately supported by legitimate, nonsectarian [governmental] interests" (*Committee for Public Education v. Nyquist, supra*, 413 U.S. at 773). That was also the conclusion of Senator Williams—chief sponsor and floor manager of the 1972 Senate bill—at the time of Senator Randolph's floor amendment. After discussing with Senator Randolph the extent of the accommodation that would be required of an employer under the proposed amendment, Senator Williams stated that he "certainly agree[d] with the objective of the amendment," that the provision ap-

¹³ There is, for example, no constitutional requirement that all coincidence between the Ten Commandments and the prohibitions in the criminal code be entirely inadvertent.

peared to promote the free exercise values embodied in the First Amendment, and that he could see "no problem" with the provision under the Establishment Clause (118 Cong. Rec. 706).

2. The primary effect of the reasonable accommodation provision is the same as its secular purpose—to preserve the equal employment opportunities of individuals whose religious requirements conflict with the work schedules of their employers but can be accommodated without undue hardship. The primary effect neither advances nor inhibits religion but rather removes artificial and unnecessary barriers to employment by ensuring that a person's religion or religious observance remains "irrelevant" (*Griggs v. Duke Power Co., supra*, 401 U.S. at 436) in connection with his job opportunities except when they significantly affect his job qualifications. As the court of appeals stated (Pet. App. 36a):

In practice, the reasonable accommodation rule restrains employers from enforcing uniform work rules that, although facially neutral, discriminate in effect against employees holding certain religious convictions. Thus the rule guarantees job security except when accommodation of an employee's religious practices would impose an undue hardship upon the employer's business.

The accommodation requirement may incidentally benefit some religious institutions by allowing working men and women to attend religious services without forfeiting their jobs. But that was equally true of the Sunday closing laws upheld by this Court in

McGowan v. Maryland, *supra*, and its companion cases. See, also, *Zorach v. Clauson*, *supra*. Indeed, this Court has repeatedly recognized that “not every law that confers an ‘indirect,’ ‘remote,’ or ‘incidental’ benefit upon religious institutions is, for that reason alone, constitutionally invalid” (*Committee for Public Education v. Nyquist*, *supra*, 413 U.S. at 771). The statute here does not compel church attendance or religious contributions, nor does it limit its protection to persons whose religious observance includes organized religious activity.

Parker Seal objects to the statute on the ground that it “confer[s] special benefits on a class of persons determined strictly on religious grounds” (Br. 33). But when the evil that Congress seeks to eradicate—employment discrimination because of religion—itself affects “a class of persons determined strictly on religious grounds” (*ibid.*), a legislative prohibition of the offensive conduct does not “confer special benefits” on the affected class but merely relieves its members of a special burden that others do not suffer.

This Court’s decisions demonstrate the fallacy of Parker Seal’s “special benefits” argument. If it is not a violation of the Establishment Clause to pay unemployment compensation benefits to a claimant solely because her apparent ineligibility is a function of Sabbatarian religious observances (*Sherbert v. Verner*, *supra*), to exempt from the operation of Sunday closing laws a class of persons whose religious beliefs require the observance of some other day as the Sabbath (*Braunfeld v. Brown*, *supra*), to excuse from compliance with compulsory school attendance

laws persons whose religious beliefs and practices conflict with such a requirement (*Wisconsin v. Yoder*, *supra*), or to release from public school attendance a class of students who wish to go to religious centers for religious instruction or devotional exercises (*Zorach v. Clauson*, *supra*), then neither does it violate the Establishment Clause to extend equal employment opportunity protection to a class of individuals whose religious observances might otherwise needlessly cost them their jobs.

Nor does the reasonable accommodation rule “‘effect . . . favoritism among sects’” (Pet. Br. 30). The statute on its face applies to “all aspects of religious observance and practice” (emphasis added), and the legislative history confirms that no one sect or group of sects was intended to be singled out for protection to the exclusion of others (see p. 41, *supra*). As in *Gillette v. United States*, *supra*, 401 U.S. at 450–451, “no particular sectarian affiliation or theological position is required,” and the statute “does not single out any religious organization or religious creed for special treatment.”¹⁴

If, by its operation, the statute protects from needless loss of employment only those workers whose religious beliefs require them to behave in a way that conflicts with their employers’ work schedules (see

¹⁴ The Equal Employment Opportunity Commission has adopted, in its application of the reasonable accommodation requirement, the same broad definition of religion that this Court applied in *United States v. Seeger*, 380 U.S. 163, and *Welsh v. United States*, 398 U.S. 333, in connection with the military conscientious objector provision. *E.g.*, EEOC Decision No. 76-104 (April 2, 1976), reported at CCH EEOC Dec. ¶ 6500.

Pet. Br. 30-31), that is not legislative favoritism of some religious sects over others. It merely defines the class of workers whose employment opportunities would otherwise be reduced because of "unnecessary barriers" (*Griggs v. Duke Power Co.*, *supra*, 401 U.S. at 431) that Congress—for valid secular reasons—sought to eliminate.

Parker Seal's favoritism argument is essentially the same as the one rejected in *Gillette*, where the Court found "a neutral, secular justification" (401 U.S. at 460) for exempting from military service only those conscientious objectors who were opposed to participation in war in any form and not those who were opposed to participation in a particular war only. The contention there, like the company's assertion here, was that the statutory provision "work[ed] a de facto discrimination among religions" (*id.* at 451-452) by favoring those whose doctrine brought their adherents within the scope of the exemption.

As in *Gillette*, the statute here serves "valid purposes having nothing to do with a design to foster or favor any sect, religion, or cluster of religions" (*id.* at 452), and its provisions are "focused on individual conscientious belief, not on sectarian affiliation" (*id.* at 454). Indeed, the statute here, unlike that in *Gillette*, is not even arguably "underinclusive" (*id.* at 452). The protected class here is fully coextensive with the class of persons who might otherwise be subjected to needless restrictions on employment opportunities on account of their religious practices.

In sum, the primary effect of the reasonable accommodation provision is "not to support, favor,

advance, or assist" religion generally or some religions in particular (*Wisconsin v. Yoder*, *supra*, 406 U.S. at 234-235, n. 22). Rather, it is to prevent employment discrimination on the basis of an individual's religious practices by requiring employers to accommodate such practices if they can reasonably do so without undue hardship in the conduct of their business. That the statute thereby allows working persons to practice their religion "free from the heavy impediment" (*ibid.*) that such discrimination would otherwise impose does not render the provision unconstitutional. On the contrary, it tends to further the interests of the Establishment Clause by allowing for religious diversity and pluralism—"mak[ing] room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary" (*Zorach v. Clauson*, *supra*, 343 U.S. at 313)—thereby avoiding conditions that might favor the formation of "government-established churches" (*Everson v. Board of Education*, 330 U.S. 1, 9). The reasonable accommodation provision reflects a wholly proper "attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma" (*Zorach v. Clauson*, *supra*, 343 U.S. at 313).

3. The statute involves no excessive government entanglement with religion. As the court of appeals correctly stated, "the reasonable accommodation requirement will not subject religious institutions to the sort of 'comprehensive, discriminating, and continuing [governmental] surveillance' that the Supreme Court

found impermissible in *Lemon v. Kurtzman*, 403 U.S. 602, 619"; the statute and regulation "require little or no contact between religious institutions and governmental entities" (Pet. App. 38a).

Parker Seal sees the danger of excessive entanglement in the need for "extensive review, first by the EEOC and then by the courts, of every phase of the employee's religious claim" (Br. 34). The contention was correctly answered by the court of appeals (Pet. App. 38a-39a):

For the most part, the EEOC and the courts will have to determine simply whether the employer has made a reasonable accommodation and whether an undue hardship will result. These issues will be considered in the labor relations context, and their resolution certainly does not necessitate any government entanglement with religion.

[Parker Seal] suggests, however, the EEOC investigators will be forced to study and to evaluate the dogma of the many religious sects in order to ascertain whether employees' practices and observances are genuinely religious and therefore protected under Title VII. In most cases, this issue probably will not be disputed seriously. To the extent that the question does arise, however, we think that it will require no more government involvement in religion than the concededly nonexcessive entanglement that occurs when a state must determine whether a purported church qualifies for a property tax exemption. See *Walz v. Tax Comm'n*, 397 U.S. 664, 674-76 (1970); *id.* at 698-99 (opinion of Harlan, J.).

Contrary to Parker Seal's interpretation of the legislative history of Section 701(j) (Br. 34-35), the flexibility and discretion with which Congress believed the statute would be administered refer not to judgments concerning the sincerity of an employee's beliefs or the tenets of his religion but rather to the pragmatic determinations concerning reasonableness and undue hardship in the circumstances of particular cases. Although some inquiry into sincerity may occasionally be required, that has not generally been an issue in cases involving the reasonable accommodation requirement.¹⁵

The government's involvement with religious institutions under the statute "can hardly be characterized as * * * active" (*Wisconsin v. Yoder*, *supra*, 406 U.S. at 234, n. 22). Rather, it would be "quick and non-judgmental" (*Roemer v. Maryland Public Works Bd.*, No. 74-730, decided June 21, 1976, slip op. 26 (plurality opinion)).

¹⁵ See, e.g., *Reid v. Memphis Pub. Co.*, 468 F. 2d 346, 348 (C.A. 6); *Riley v. Bendix Corp.*, 464 F. 2d 1113, 1114 (C.A. 5); *Dewey v. Reynolds Metals Co.*, *supra*, 429 F. 2d at 335; *Dawson v. Mizell*, 325 F. Supp. 511, 513 (E.D. Va.); *Jackson v. Veri Fresh Poultry Co.*, 304 F. Supp. 1276, 1278 (E.D. La.).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

J. STANLEY POTTINGER,
Assistant Attorney General.

LAWRENCE G. WALLACE,
Deputy Solicitor General.

MARK L. EVANS,
Assistant to the Solicitor General.

BRIAN K. LANDSBERG,
DENNIS J. DIMSEY,
JOHN C. HAMMOCK,
Attorneys.

ABNER W. SIBAL,
General Counsel,
JOSEPH T. EDDINS,
Associate General Counsel,

BEATRICE ROSENBERG,
CHARLES L. REISCHEL,
LUTZ ALEXANDER PRAGER,
GERALD D. LETWIN,
Attorneys,

*Equal Employment Opportunity
Commission.*

SEPTEMBER 1976.

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-478

MAY 14 1976

MICHAEL REGAN, JR., CLERK

PARKER SEAL COMPANY,
Petitioner,

vs.

PAUL CUMMINS,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

**AMICUS CURIAE BRIEF OF TRANS WORLD
AIRLINES, INC. IN SUPPORT OF PETITIONER
PARKER SEAL COMPANY**

DICK H. WOODS
GEORGE E. FELDMILLER
STINSON, MAG, THOMSON, McEVERS & FIZZELL
2100 TenMain Center
Kansas City, Missouri 64105
(816) 842-8600
Attorneys for Trans World Airlines, Inc.

Of Counsel:

RAYMOND R. FLETCHER, JR.
Vice President and General Counsel
JAMES J. MOLLENKAMP
Assistant General Counsel
Trans World Airlines, Inc.
Post Office Box 20126
Kansas City International Airport
Kansas City, Missouri 64195
(816) 891-7500

TABLE OF CONTENTS

I. Opinions Below	2
II. Jurisdiction	2
III. Constitutional Provision, Statute and Regulations Involved	2
IV. Questions Presented	4
V. Statement of the Case	4
VI. Interest of the Amicus Curiae	4
VII. Argument—	
I. The Statute and Guideline Violate the Estab- lishment Clause	7
II. The Interpretation of the Statute and Guide- line by the Court of Appeals Results in Innu- merable Recurrent Nationwide Problems in the Administration of Uniform Work Rules	13
Conclusion	15

Table of Authorities

CASES

<i>Committee for Public Education and Religious Educa- tion and Religious Liberty v. Nyquist</i> , 413 U.S. 757 (1973)	7, 9
<i>Cummins v. Parker Seal Company</i> , 516 F.2d 544 (6th Cir. 1975)	4, 9, 10, 12, 13, 15
<i>Draper v. U. S. Pipe & Foundry</i> , 527 F.2d 515 (6th Cir. 1975)	10
<i>Dewey v. Reynolds Metals Co.</i> , 429 F.2d 324 (6th Cir. 1970), <i>aff'd</i> , 402 U.S. 689 (1971)	7, 10
<i>Everson v. Board of Education</i> , 330 U.S. 1 (1947)	9
<i>Gillette v. United States</i> , 401 U.S. 437 (1971)	9

II

<i>Hardison v. Trans World Airlines, Inc.</i> , 375 F. Supp. 877 (W.D. Mo. 1974), <i>rev'd</i> 527 F.2d 33 (8th Cir. 1975), pet. for cert. filed February 9, 1976 (No. 75-1126)	5, 6, 9, 10, 12, 13, 15
<i>Johnson v. United States Postal Service</i> , 497 F.2d 128 (5th Cir. 1974)	10
<i>Otten v. Baltimore & O.R.R.</i> , 205 F.2d 58 (2d Cir. 1953)	12
<i>Reid v. Memphis Publishing Company</i> , 468 F.2d 346 (6th Cir. 1972)	10
<i>Reid v. Memphis Publishing Company</i> , 521 F.2d 512 (6th Cir. 1975)	10
<i>Riley v. Bendix Corporation</i> , 464 F.2d 1113 (5th Cir. 1972)	10
<i>Roberts v. Hermitage Cotton Mills</i> , 8 F.E.P. 315 (D.C. S.C. 1974), <i>aff'd</i> 8 F.E.P. 319 (4th Cir. 1974)	10
<i>Torasco v. Watkins</i> , 367 U.S. 488 (1961)	9
<i>Yott v. North American Rockwell</i> , 501 F.2d 398 (9th Cir. 1974)	11, 15
<i>Young v. Southwestern Savings & Loan</i> , 509 F.2d 140 (5th Cir. 1975)	10

CONSTITUTIONAL PROVISION, STATUTES AND REGULATIONS

29 C.F.R. § 1605.1 (1974)	3
Civil Rights Act of 1964, as amended—	
42 U.S.C. § 2000e(j) (Supp. II, 1972)	2-3
42 U.S.C. § 2000e-2(a)(1) (1970)	3
42 U.S.C. § 2000e-2(h)	3, 13
Constitution of the United States, Amendment I	2, 4, 7, 11
National Labor Relations Act (29 U.S.C. § 151, et seq.)	13, 14
Railway Labor Act (45 U.S.C. § 151, et seq.)	13, 14

III

OTHER AUTHORITY

110 Cong. Rec. 1528-29 (1964)	8
118 Cong. Rec. 705 (1972)	8
Edwards and Kaplan, <i>Religious Discrimination and the Role of Arbitration Under Title VII</i> , 69 Mich. L. Rev. 599, 628, 639 (1971)	7, 9
44 Fordham L. Review 442 (1975)	7, 10
18 Mich. Law Quad. Notes No. 2, p. 17 (1974)	7
U.S. Bureau of the Census, <i>Statistical Abstract of the United States: 1975</i> , Table No. 579, p. 353; Table No. 63, p. 46 (96th ed. 1975)	11

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-478

PARKER SEAL COMPANY,
Petitioner,

VS.

PAUL CUMMINS,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

**AMICUS CURIAE BRIEF OF TRANS WORLD
AIRLINES, INC. IN SUPPORT OF PETITIONER
PARKER SEAL COMPANY**

Trans World Airlines, Inc. (hereinafter referred to as "TWA"), as *amicus curiae*, supports Parker Seal Company, the petitioner (hereinafter referred to as "Parker Seal"), in praying that the judgment of the United States Court of Appeals for the Sixth Circuit entered herein on May 23, 1975, be reversed. This *amicus curiae* brief is submitted by TWA upon the consent of all the parties pursuant to Supreme Court Rule 42. The written consents have either been filed or will soon be filed with the Clerk of the Court.

I. OPINIONS BELOW

The opinion of the court of appeals is reported at 516 F.2d 544. The opinion of the district court is unreported. The opinion of the Kentucky Commission on Human Rights is unreported.

II. JURISDICTION

The judgment of the court of appeals was entered May 23, 1975. A timely petition for rehearing was denied by order entered July 18, 1975. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). On or about March 1, 1976, this Court granted the petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Sixth Circuit.

III. CONSTITUTIONAL PROVISION, STATUTE AND REGULATIONS INVOLVED

The establishment clause of the First Amendment provides: "Congress shall make no law respecting an establishment of religion. . . ."

Section 701(j) of the Civil Rights Act of 1964, as amended, provides:

"The term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue

hardship on the conduct of the employer's business." 42 U.S.C. § 2000e(j) (Supp. II, 1972).

Section 703(a)(1) of the Civil Rights Act of 1964, as amended, provides in pertinent part:

"It shall be an unlawful employment practice for an employer . . . to . . . discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's . . . religion. . . ." 42 U.S.C. § 2000e-2(a)(1) (1970).

Section 703(h) of the Civil Rights Act of 1964, as amended, provides in pertinent part:

"Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply * * * different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system * * * provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex or national origin. * * *" 42 U.S.C. § 2000e-2(h).

Guideline 1605.1 of the United States Equal Employment Opportunity Commission provides in pertinent part:

"[S]ection 703(a)(1) of the Civil Rights Act of 1964 . . . includes an obligation on the part of the employer to make reasonable accommodations to the religious needs of employees and prospective employees where such accommodations can be made without undue hardship on the conduct of the employer's business.

"[T]he employer has the burden of proving that an undue hardship renders the required accommodations to the religious needs of the employee unreasonable." 29 C.F.R. § 1605.1 (1974).

IV. QUESTIONS PRESENTED

TWA adopts the statement of questions presented by Parker Seal in its brief and petition for a writ of certiorari. Additionally, TWA respectfully submits that because of the widespread presence in industry throughout the nation of collective bargaining agreements containing seniority and other uniform work rules provisions, additional important questions inhere in such cases regarding what employers and unions must do in their respective efforts to reasonably accommodate the diverse religious practices of employees.

One such additional question is whether an employer can be required under the Civil Rights Act and establishment clause of the First Amendment to accommodate an employee's religious practices by (a) depriving, without union consent, more senior employees (who may or may not have any religious beliefs) of their seniority rights under a bona fide collective bargaining agreement that is completely nondiscriminatory against any religion; or (b) financing an employee's religious observances through payment of premium or overtime wages to a replacement?

V. STATEMENT OF THE CASE

This case is before the Court following extensive investigation and litigation before state and federal administrative agencies and the lower federal courts. The facts underlying petitioner's claim as well as a descriptive history of the prior investigation and litigation are fully and amply set forth in the brief of Parker Seal. Significantly, the trier of facts in *Parker Seal* (both the Kentucky Commission on Human Rights and the district court) found in favor of

Parker Seal. *Parker Seal* does not, however, include in its factual background a collective bargaining agreement containing nondiscriminatory seniority clauses and other provisions establishing uniform work rules of the kind TWA and many other employers have entered into with unions.

VI. INTEREST OF THE AMICUS CURIAE

TWA is a corporation engaged in the transportation by air of persons, property and mail in interstate and foreign commerce. It has some 37,000 employees of which approximately 53% are covered by contracts with unions, including some 15,000 employees covered under TWA's collective bargaining agreement with the International Association of Machinists and Aerospace Workers.

As a carrier by air, TWA is subject to Title II of the Railway Labor Act, as amended, which gives employees the right to organize and bargain collectively through representatives of their own choosing and imposes upon air carriers and their employees the duty to use every reasonable effort to make and maintain agreements concerning rates of pay, rules and working conditions, and to settle by negotiation all disputes arising between them.

TWA's interest in this case is direct because it is a party in *Hardison v. Trans World Airlines, Inc.*, 375 F. Supp. 877 (W.D. Mo. 1974), *rev'd* 527 F.2d 33 (8th Cir. 1975), *pet. for cert. filed* February 9, 1976 (No. 75-1126), which, unlike *Parker Seal*, presents the applicability of a nondiscriminatory collective bargaining agreement that did not lock-in the effects of past religious discrimination. Briefly, in *Hardison*, TWA was able to initially accommodate *Hardison's* Friday sundown to Saturday sundown Sabbath requirements; how-

ever, Hardison thereafter transferred, to suit his own convenience, to a new shift where he knew he did not have sufficient seniority to avoid Saturday work. TWA continued its efforts to again accommodate Hardison's religious practices but could not do so within the framework of the collective bargaining agreement. The union refused to waive or breach the agreement. The seniority provision was, by stipulation and court finding, completely nondiscriminatory and did not lock-in any effects of past religious discriminatory conduct. Hardison was the only person performing his essential job on the new shift and his seniority position would have required him to work on Saturdays. After Hardison was absent for several successive Saturdays and left work early on a Friday shift, a discharge hearing was held under the collective bargaining agreement and Hardison was discharged. Hardison did not thereafter cooperate with his local union in its efforts to pursue grievance procedures in respect to his discharge. After having the matter under advisement for 53 weeks, the Court of Appeals for the Eighth Circuit reversed the district court's decision in favor of TWA. The circuit court, in effect, gave preferential treatment to Hardison solely on the basis of his religion even though such treatment would require TWA to pay overtime wages to other employees and cause other employees to give up their seniority rights. Consequently, *Hardison* generates the above-noted additional question set forth by TWA.

VII. ARGUMENT

I. The Statute and Guideline Violate the Establishment Clause.

The existence of "grave constitutional questions" was raised in the first key case concerning accommodation of an employee's religious beliefs. *Dewey v. Reynolds Metals Co.*, 429 F.2d 324, 334 (6th Cir. 1970), *aff'd* by an equally divided court, 402 U.S. 689 (1971). After the *Dewey* decision, distinguished legal scholars have asserted that a construction of Title VII of the Civil Rights Act in the circumstances presented in this case and in *Hardison* would constitute a violation of the establishment clause of the First Amendment. Edwards and Kaplan, *Religious Discrimination and the Role of Arbitration Under Title VII*, 69 Mich. L. Rev. 599, 628 (1971). See also, law review note on recent developments in 44 Fordham L. Review 442 (1975).

Judge Celebrezze's challenging dissent identifies the danger inherent in the circuit court's decision. If Congress is permitted to breach the First Amendment by granting benefits to religion, it is thereby empowered to take away religious freedoms. The same concern was eloquently expressed in a slightly different vein by a great religious constitutional scholar, the late Paul G. Kauper, in 18 Mich. Law Quad. Notes No. 2, p. 17, 1974, "In our pluralistic society with its diverse religious elements no single religion can claim for itself a favored position in the law, and the law in turn may not reflect the views of a single religious community."

Application of the three-part test set forth in *Committee for Public Education and Religious Education and Religious Liberty v. Nyquist*, 413 U.S. 757 (1973), requires a finding that Title VII, as construed by the court of appeals, is violative of the establishment clause.

First, the statute and guideline lack a primary "secular legislative purpose". The legislative history of the 1972 amendment contains no suggestion that religious discrimination in employment was a problem requiring remedial legislation.¹ Rather, the purpose, as explained by its sponsor, Senator Randolph, was admittedly to stem the "dwindling of the membership of some religious organizations" which prohibit Saturday labor and because of a "possible inability of employers on some occasions to adjust work schedules to fit the requirements of the faith of some of their workers." 118 Cong. Rec. 705 (1972). Thus, the 1972 amendment and EEOC regulation were explicitly designed to benefit members of particular religious groups without regard to employers' normal work schedules or the rights of other employees who may not believe in that religion or who have no religious beliefs. The statutory purpose to foster religion could not be clearer.

Second, the statute and guideline have the direct and immediate effect of advancing religion. The law unquestionably requires an employer to discriminate in favor of

1. There was at best sparse evidence of religious (as opposed to racial) discrimination before Congress when it passed the 1964 Civil Rights Act. According to Congressman Celler, Chairman of the House Judiciary Committee:

We did not have very much testimony of discrimination on the grounds of religion. You will notice in one of the titles, religion is left out. . . .

We had very little evidence—I do not think we had any of it insofar as the Committee on the Judiciary is concerned that any particular sect or religion had been discriminated against. 110 Cong. Rec. 1528-29 (1964).

Senator Randolph specifically mentioned the Orthodox Jews, the Seventh-Day Adventists, and the denomination to which he himself belonged, the Seventh-Day Baptists. In this connection he stated:

My own pastor in this area, Rev. Delmar Van Horn, has expressed his concern and distress that there are certain faiths that are having a very difficult time, especially with the younger people. . . . 118 Cong. Rec. 705 (1972).

individual employees on the basis of their religious beliefs. Illustratively, the *Parker Seal* court held, in effect, that Cummins must be accorded preferential treatment solely because of his religious beliefs. Similarly, *Hardison* required an employer to incur overtime charges for replacement employees, reduce the work coverage of other areas, or violate, without union consent, a bona fide and nondiscriminatory seniority provision in order to accommodate an employee's religious beliefs. Governmental sanction is placed upon the practice of facilitating and encouraging employees to require time off for religious observances so that employees with religious beliefs are aided as against nonbelievers. The government, in essence, is requiring that special preferences be given to certain employees over others solely because of religious beliefs. Thus, there simply is no evidence that the law is "evenhanded in operation" or "neutral in primary impact." *Gillette v. United States*, 401 U.S. 437, 450 (1971).

To meet the requirement of a clearly secular purpose, the law must be neutral as it affects believers and nonbelievers as well as neutral in intent and effect. *Everson v. Board of Education*, 330 U.S. 1, 15 (1947); *Committee for Public Education & Religious Liberty, supra*; and *Torasco v. Watkins*, 367 U.S. 488, 495 (1961). In application, the 1972 amendment and guideline require nonbelieving employees to bear the burden, inconvenience and expense of the varying religious practices of others.² Specific religions undoubtedly will benefit at the expense or burden of

2. In criticizing the thrust and impact of the EEOC's regulations, Edwards and Kaplan present compelling hypotheticals and arguments undercutting the constitutional framework for both the regulation and the statute as later amended. See page 628 of their above-noted article. The authors criticize the EEOC guidelines, *inter alia*, because they appear to be premised on a fundamentally distorted conception of the proper place of religion in a secular society.

persons who do not have that religion. Thus, as construed by the court of appeals, the law is not neutral in either intent or effect.

While there is no need to reach the third part of the test, the statute and guideline patently require pervasive and excessive government entanglement with religion. The law requires a court to make a determination as to the sincerity and depth of the employee's beliefs.³ The court must then evaluate the employer's efforts to accommodate thereby involving courts in a most subjective area. The danger of placing the government in the position of determining whether an employer has reasonably accommodated an employee's religion is illustrated by the striking number of times, including *Parker Seal* and *Hardison*, in which findings of fact in religious discrimination cases have been reversed.⁴ If judges in the federal court system cannot agree what factual context constitutes reasonable religious accommodation, an area which common sense and history tells us is very subjective and volatile, it is too great a burden for the government to require an employer to accommodate an employee's religious practices by giv-

3. See 44 Fordham L. Rev. 442, 449; n. 61 (1975).

4. The following eight decisions involve reversals of district court findings and opinions in the religious discrimination area. *Dewey v. Reynolds Metals Company*, 429 F.2d 324 (6th Cir. 1970); *Riley v. Bendix Corporation*, 464 F.2d 1113 (5th Cir. 1972); *Reid v. Memphis Publishing Company*, 468 F.2d 346 (6th Cir. 1972); *Young v. Southwestern Savings & Loan*, 509 F.2d 140 (5th Cir. 1975); *Cummins v. Parker Seal Company*, 516 F.2d 544 (6th Cir. 1975); *Reid v. Memphis Publishing Company*, 521 F.2d 512 (6th Cir. 1975); *Draper v. U. S. Pipe & Foundry*, 527 F.2d 515 (6th Cir. 1975); and *Hardison v. Trans World Airlines, Inc.*, 527 F.2d 33 (8th Cir. 1975). In *Johnson v. United States Postal Service*, 497 F.2d 128 (5th Cir. 1974) and *Roberts v. Hermitage Cotton Mills*, 8 F.E.P. 315 (D.C.S.C. 1974), *aff'd* 8 F.E.P. 319 (4th Cir. 1974), district court findings were held not to be clearly erroneous. The latter two cases held for the employer and are factually similar to *Parker Seal* and *Hardison*.

ing that employee preferential treatment to the detriment of other employees.

Moreover, the EEOC has promulgated extensive, and oftentimes contradictory, guidelines governing what an employer must do under the law. *Yott v. North American Rockwell*, 501 F.2d 398 (9th Cir. 1974). Those guidelines affect the employer, the accommodated employee and all other employees. The government is thus inextricably involved in serious practical problems for employers, employees and labor organizations in the scheduling of work assignments and the application of other uniform work rules so as not to conflict with the large variety of existing religious practices.⁵

In the final analysis, whether it is more important for a junior employee to practice his religion or for another more senior man, who may or may not have any religious beliefs, to spend a Saturday with his family is a question that is for individual choice. The establishment clause of the First Amendment prevents the government and the federal courts from imposing their views as to what religious sacrifices or accommodations are nec-

5. As of April, 1975, approximately 77,994,000 persons were employed in non-agricultural establishments, including manufacturing, wholesale and retail trade, government, transportation and public utilities, finance, insurance and real estate, contract construction and mining. U.S. Bureau of the Census, *Statistical Abstract of the United States: 1975*, Table No. 579 at p. 353 (96th ed. 1975).

Membership in religious bodies for the year 1973 totaled 131,245,000. Some denominations celebrating a Sabbath which commences on Friday sundown and ends on Saturday, include the following: Seventh-Day Adventists—464,000; Jewish—6,115,000.

The burden imposed upon an employer is by no means limited to reasonably accommodating Sabbatharians. Many Americans are affiliated with non-Judeo-Christian religions which celebrate entirely different holidays. The only such religion with a membership in excess of 50,000 is the Buddhist persuasion—60,000. *Id.*, Table No. 63 at p. 46.

essary in secular living, particularly in situations in which a nondiscriminatory seniority provision establishes a uniform rule for all persons.

Title VII, as misconceived by the court of appeals, completely overlooks the teaching of *Learned Hand in Otten v. Baltimore & O.R.R.*, 205 F.2d 58, 61 (2d Cir. 1953) wherein the importance of proper deference to the need for an individual to also accommodate and compromise his religious beliefs was cogently stated:

"The First Amendment protects one against action by the government . . . but it gives no one the right to insist that in the pursuit of their own interests others must conform their conduct to his own religious necessity. . . . We must accommodate our idiosyncracies, religious as well as secular, to the compromises necessary in communal life; and we can hope for no reward for the sacrifices this may require beyond our satisfaction from within, or our expectations for a better world."

The need for some flexibility on the part of the concerned employee to accommodate or adjust his religious idiosyncracies is illustrated by both *Parker Seal* and *Hardison*. *Parker Seal* actually accommodated Cummins until business exigencies required work adjustments. TWA also accommodated Hardison until he voluntarily bid into a new shift where he knew he would have difficulty in observing his Sabbath. In both cases, the employer was unable to make subsequent accommodations. Yet, the decisions by both courts of appeal place the entire burden of accommodation upon the employers despite their obvious good faith efforts to be more than fair to all parties.

II. The Interpretation of the Statute and Guideline by the Court of Appeals Results in Innumerable Recurrent Nationwide Problems in the Administration of Uniform Work Rules.

The decision of the court of appeals in *Parker Seal*, far from enhancing less discrimination in employment, will require the employer and union to shift employees out of seniority and dispossess them of the protection of other uniform work rules to accommodate diverse religious beliefs. Indeed, the holdings in *Parker Seal* and *Hardison* result in it being virtually impossible for an employer with a large labor force to demonstrate any "undue hardship" in reasonably accommodating religious practices of its employees. The need to reverse the problems created by the decisions in *Parker Seal* and *Hardison* is heightened by the innumerable and inevitable conflicts thrust upon the thousands of employers and unions across the country that are governed in their relations by collective bargaining agreements, which, in the language of 703(h) of Title VII, 42 U.S.C. § 2000e-2(h), ". . . are not the result of an intention to discriminate because of . . . religion. . . ."

Many industries operate under collective bargaining agreements pursuant to important federal statutory schemes such as the Railway Labor Act (45 U.S.C. § 151, et seq.) and the National Labor Relations Act (29 U.S.C. § 151, et seq.). Those collective bargaining agreements cover thousands of employees. To require an employer, like TWA, to accommodate the various religious idiosyncracies of its thousands of employees would pose insurmountable problems in the performance of its seven-days-a-week airline operations. Those problems are magnified to crisis proportion when employers are required to vi-

olate bona fide and completely nondiscriminatory seniority principles or other uniform work rules of collective bargaining agreements to accommodate the varying religious needs of thousands of employees. Furthermore, in the absence of a past pattern of religious discrimination, depriving a more senior employee of hard-earned seniority rights or other uniform work rules is counterproductive to cardinal provisions of the Railway Labor Act and the National Labor Relations Act.⁶

Accommodation of employee religious beliefs frequently simply cannot be made without disruption of work schedules and creation of inequitable or unfair preferential personnel practices. Many industries, like TWA, are engaged in continuous process operations. Shift stability and other uniform work rules are essential to avoid slowdowns, backups, wasted manpower and material, and, in TWA's case, to maintain airline schedules for the benefit of the public. Such industries, like TWA, operate twenty-four-hours-per-day, seven-days-a-week and 365 days each year.

The court of appeals places the employer in an intolerable position. If he is a large employer, it is virtually impossible to prove an undue hardship. The employer must grant employees with diverse religious needs special privileges by requiring other employees (who may not even have any religious beliefs) to forego legitimate seniority rights. Additionally, the employer must incur grievances, morale and work scheduling problems and the extra cost of overtime replacements while the excused employee would have the option to observe his particular religious beliefs.

6. The importance of seniority in our national labor relations policy is well set forth in *Edwards & Kaplan, supra*, at 639.

Illustrative of the many other uniform work rules which the large employer and unions will find difficult, if not impossible, to justify, unless the decisions in *Parker Seal* and *Hardison* are reversed, will be the payment of union dues or union shop agreements. See, for example, *Yott v. North American Rockwell*, 501 F.2d 398 (9th Cir. 1974). See also the dissent of Judge Celebrezze in *Parker Seal*.

CONCLUSION

Based upon all of the foregoing, TWA respectfully prays that the Court reverse the decision and judgment of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

DICK H. WOODS
 GEORGE E. FELDMILLER
 STINSON, MAG, THOMSON, McEVERS & FIZZELL
 2100 TenMain Center
 Kansas City, Missouri 64105
 (816) 842-8600
Attorneys for Trans World Airlines, Inc.

Of Counsel:

RAYMOND R. FLETCHER, JR.
 Vice President and General Counsel
 JAMES J. MOLLENKAMP
 Assistant General Counsel
 Trans World Airlines, Inc.
 Post Office Box 20126
 Kansas City International Airport
 Kansas City, Missouri 64195
 (816) 891-7500

No. 75-478

Supreme Court, U. S.
FILED

MAY 14 1976

MICHAEL RODAK, JR., CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1975

PARKER SEAL COMPANY, *Petitioner,*

v.

PAUL CUMMINS, *Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SIXTH CIRCUIT

MOTION OF THE INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE WORKERS FOR
LEAVE TO FILE BRIEF AS AMICUS CURIAE
AND
BRIEF AS AMICUS CURIAE

JOHN O'B. CLARKE, JR.
WILLIAM G. MAHONEY
1015 Eighteenth Street, N. W.
Washington, D. C. 20036

PLATO E. PAPPS
General Counsel, International
Association of Machinists
and Aerospace Workers
1300 Connecticut Ave., N.W.
Washington, D. C. 20036

*Counsel for International
Association of Machinists
and Aerospace Workers*

Of Counsel:

HIGSAW, MAHONEY & FRIEDMAN
1015 Eighteenth Street, N.W.
Washington, D. C. 20036

May 15, 1976

IN THE
Supreme Court of the United States
OCTOBER TERM, 1975

No. 75-478

PARKER SEAL COMPANY, *Petitioner*,

v.

PAUL CUMMINS, *Respondent*.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SIXTH CIRCUIT

MOTION OF THE INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE WORKERS FOR
LEAVE TO FILE BRIEF AS AMICUS CURIAE

The International Association of Machinists and Aerospace Workers [hereinafter, "IAM"], pursuant to Rule 42(3) of the Rules of this Court, respectfully requests leave to file the attached brief as an *amicus*

curiae in the case *sub judice*. On April 26, 1976, the IAM requested the consent of both parties to file a brief as an *amicus curiae*, and on May 6, 1976, counsel for petitioner stated that they did not object to the IAM filing a brief as an *amicus curiae*. Counsel for respondent, however, informed the IAM by a letter dated April 30, 1976, that they would not voluntarily consent to the *amicus curiae* participation of the IAM.

INTEREST OF THE IAM

The IAM is a labor organization within the meanings of the National Labor Relations Act, the Railway Labor Act, and Title VII of the Civil Rights Act of 1964, and as such represents almost one million workers throughout the United States in their employment relationship. In furtherance of that representation, the IAM, either through the International or its subordinate units, is a party to over two thousand collectively bargained for agreements which detail the rates of pay, rules, or working conditions of its members and others covered by those agreements.

Since Title VII of the Civil Rights Act of 1964 in part governs both the employer-employee relationship and the relation between a union and those it represents, the IAM always has an interest in cases construing the reach of that statute. That interest is substantial in the case at bar, it is submitted, because of the subjective and diverse nature of questions of religious discrimination, and because of the virtual lack of any meaningful guidance from either the Equal Employment Opportunity Commission or the courts of appeals in approaching claims of religious dis-

crimination. This lack of meaningful guidance is particularly perplexing to the IAM since it must fairly represent not only the employee asserting discrimination, but also the employees who under existing laws and regulations must, in many cases, pay the price of the accommodation of the first employee's religious beliefs.

Unlike that of either petitioner's or respondent's, the IAM's interest in the case at bar extends beyond the "Sabbath observance" question squarely presented by the facts of the case at bar, to the enforceability of contractual provisions, such as a "union shop" agreement which may well be affected by the approach chosen by this Court to answer the challenge to the constitutionality of Title VII's ban on religious discrimination. Compare, *Yott v. North American Rockwell Corp.*, 501 F.2d 398 (9th Cir. 1974), with, *McDaniel v. Essex International, Inc.*, W.D. Mich., No. G74-288 C.A., decided January 13, 1976, as modified March 15, 1976, appeal pending (unreported; attached as Appendix A to brief); see also, *Hardison v. Trans World Airlines, Inc.*, 527 F.2d 33 (8th Cir. 1975), petitions for writ of *certiorari* pending, Sup. Ct. Nos. 75-1126, 75-1385. Since the IAM's interest extends beyond the four corners of the case *sub judice* to the entire area of religious discrimination in employment, it is believed that the brief which *amicus curiae* is requesting permission to file will treat the broader aspects of the matter at issue; this approach will not, it is submitted, broaden the issues presently before this Court.

WHEREFORE, the IAM respectfully requests that it be granted leave to file the attached brief as an *amicus curiae* in the case at bar.

Respectfully submitted,

JOHN O'B. CLARKE, JR.
WILLIAM G. MAHONEY
1015 Eighteenth Street, N. W.
Washington, D. C. 20036

PLATO E. PAPPS
General Counsel, International
Association of Machinists
and Aerospace Workers
1300 Connecticut Ave., N.W.
Washington, D. C. 20036

*Counsel for International
Association of Machinists
and Aerospace Workers*

Of Counsel:

HIGHSAW, MAHONEY & FRIEDMAN
1015 Eighteenth Street, N.W.
Washington, D. C. 20036

May 15, 1976

IN THE
Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-478

PARKER SEAL COMPANY, *Petitioner,*

v.

PAUL CUMMINS, *Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SIXTH CIRCUIT

**BRIEF FOR THE INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE WORKERS AS
AMICUS CURIAE**

JOHN O'B. CLARKE, JR.
WILLIAM G. MAHONEY
1015 Eighteenth Street, N. W.
Washington, D. C. 20036

PLATO E. PAPPS
General Counsel, International
Association of Machinists
and Aerospace Workers
1300 Connecticut Ave., N.W.
Washington, D. C. 20036

*Counsel for International
Association of Machinists
and Aerospace Workers*

Of Counsel:

HIGHSAW, MAHONEY & FRIEDMAN
1015 Eighteenth Street, N.W.
Washington, D. C. 20036

May 15, 1976

TABLE OF CONTENTS

	Page
BRIEF	
INTEREST OF THE IAM	3
STATEMENT OF THE CASE	3
ARGUMENT:	
I. While Congress May Lawfully Require Employers and Employees To Not Discriminate Against Other Employees Because of Their Religious Beliefs, Congress Is Prohibited by the Establishment Clause from Requiring That Employers or Employees Pay for the Religious Beliefs of Other Employees by Accommodating Those Beliefs. . .	6
A. History of Title VII's ban on religious discrimination	8
B. Title VII's accommodation requirement is actually a command that employers and unions yield to all claims of alleged discrimination because of religious beliefs, regardless of their merit.	12
C. Title VII's accommodation requirement violates the position of neutrality required by the First Amendment.	15
D. Title VII's ban on religious discrimination is not unconstitutional; only the accommodation provisions violate the Religious Clauses.	19
II. This Court in the Exercise of Its Supervisory Powers Should Set Forth General Guidelines in Its Decision by Which Employers, Unions and Employees Will Be Able to Gauge Their Rights and Duties under Title VII's Ban on Religious Discrimination	20
CONCLUSION	23
APPENDIX A	

INDEX TO CITATIONS

CASES:	Page
<i>Albemarle Paper Co. v. Moody</i> , 422 U.S. 405 (1975)	13, 21, 22, 23
<i>American Airlines, Inc. v. CAB</i> , 445 F.2d 891 (2d Cir. 1971), <i>cert. denied</i> , 404 U.S. 1015 (1972)	19
<i>Braunfeld v. Brown</i> , 366 U.S. 599 (1961)	15
<i>Committee For Public Education v. Nyquist</i> , 413 U.S. 756 (1973)	6, 16, 18, 20
<i>Dewey v. Reynolds Metals Co.</i> , 429 F.2d 324 (6th Cir. 1970), <i>aff'd by an equally divided Court</i> , 402 U.S. 689 (1971)	10, 11
<i>Everson v. Board of Education</i> , 330 U.S. 1 (1947)	7, 17
<i>Gillette v. United States</i> , 401 U.S. 437 (1971)	17
<i>Gray v. Gulf, M. & O. R. R.</i> , 429 F.2d 1064 (5th Cir. 1970), <i>cert. denied</i> , 400 U.S. 1001 (1971)	14
<i>Griggs v. Duke Power Co.</i> , 401 U.S. 424 (1971)	11, 12, 15, 17
<i>Hammond v. United Papermakers Union</i> , 462 F.2d 174 (6th Cir.), <i>cert. denied</i> , 409 U.S. 1028 (1972)	14
<i>Hardison v. Trans World Airlines, Inc.</i> , 527 F.2d 33 (8th Cir. 1975), <i>pets. for cert. pending</i> , Sup. Ct. Nos. 75-1126, 75-1385	5, 12, 21
<i>Johnson v. U.S. Postal Service</i> , 497 F.2d 128 (5th Cir. 1974)	12, 21
<i>Lemon v. Kurtzman</i> , 403 U.S. 602 (1971)	6, 18, 20
<i>Linscott v. Millers Falls Co.</i> , 440 F.2d 14 (1st Cir.), <i>cert. denied</i> , 404 U.S. 872 (1971)	13, 14
<i>McDaniel v. Essex International, Inc.</i> , W.D. Mich., No. G74-288 C.A., decided January 13, 1976, as modified March 15, 1976 (unreported), appeal pending	21
<i>McDonnell Douglas Corp. v. Green</i> , 411 U.S. 792 (1973)	21, 22
<i>Meek v. Pittenger</i> , 421 U.S. 349 (1975)	7, 8, 18, 19
<i>NLRB v. Hershey Foods Corp.</i> , 513 F.2d 1083 (9th Cir. 1975)	14
<i>Otten v. Baltimore & O. R. R.</i> , 205 F.2d 58 (2nd Cir. 1953)	14, 20
<i>Reed v. Reed</i> , 404 U.S. 71 (1971)	22
<i>Reid v. Memphis Publishing Co.</i> , 468 F.2d 346 (6th Cir. 1972)	10

	Page
<i>Reid v. Memphis Publishing Co. [ReidIII]</i> , 521 F.2d 512 (6th Cir. 1975), <i>pet. for cert. pending</i>	21
<i>Sherbert v. Verner</i> , 374 U.S. 398 (1963)	15
<i>Steele v. Louisville & N. R. R.</i> , 323 U.S. 192 (1944)	3
<i>United States v. Lowden</i> , 308 U.S. 225 (1939)	18
<i>Wicks v. Southern Pacific Co.</i> , 231 F.2d 130 (9th Cir.), <i>cert. denied</i> , 351 U.S. 946 (1956)	14
<i>Yott v. North American Rockwell Corp.</i> , 501 F.2d 398 (9th Cir. 1974)	13, 14, 15, 21
STATUTES:	
Bill For Establishing Religious Freedom (Va. 1786) ..	7
Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, <i>et seq.</i>	2, 8, 10, 11
Section 701(j), 42 U.S.C. § 2000e(j) ..	2, 5, 10, 11, 12, 15, 16, 19, 21, 22
Section 703, 42 U.S.C. § 2000e-2	16, 18, 19, 21
Section 706(g), 42 U.S.C. § 2000e-5(g)	11
MISCELLANEOUS:	
Constitution of the United States:	
First Amendment	5
Fourteenth Amendment	17
29 C.F.R. § 1605.1	2, 5, 9, 10, 11, 16, 21, 22
118 Cong. Rec. 705-06 (1972)	10, 11, 17
110 Cong. Rec. 1528-29 (1964)	8, 22
31 Fed. Reg. 8370 (1966)	9
EEOC Seventh Annual Report	13
EEOC Ninth Annual Report	13
Hearings on S. 773, S. 1210, S. 1211, and S. 1937 Before Subcommittee on Employment and Manpower of the Senate Committee on Labor and Public Welfare, 88th Cong., 1st Sess., pp. 196, <i>et seq.</i>	8, 9

IN THE
Supreme Court of the United States
OCTOBER TERM, 1975

No. 75-478

PARKER SEAL COMPANY, *Petitioner*,

v.

PAUL CUMMINS, *Respondent*.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE WORKERS AS
AMICUS CURIAE

On May 23, 1975, the United States Court of Appeals for the Sixth Circuit issued its decision in the case at bar, 516 F.2d 544, reversing the findings of the United States District Court for the Eastern District of Kentucky that petitioner had not violated Title VII's ban on religious discrimination when it discharged respondent for refusing to work on Saturdays. Concluding that the district court's finding of fact was unsupported by substantial evidence when it had found, as had the administrative agency which first considered respond-

ent's claim,¹ that a further accommodation of respondent's religious practices would have imposed an undue hardship on the conduct of petitioner's business, a majority of the appellate panel set aside that ultimate finding. Pet. App. D at 28a. The Court then proceeded to make its own finding that petitioner had "discriminated against . . . [respondent] on the basis of his religion in violation of Title VII of the Civil Rights Act of 1964 [42 U.S.C. § 2000e, *et seq.*]." *Id.* at 31a. Having made that determination, the appellate court considered and rejected a challenge to the constitutionality of 29 C.F.R. § 1605.1 (the Equal Employment Opportunity Commission regulation in effect today and at the time of respondent's discharge) and its subsequent codification in Section 701(j) of the Civil Rights Act of 1964, as amended in 1972 (42 U.S.C. § 2000e(j)). One judge, Judge Celebrezze, dissented on the grounds that as construed by the majority, Title VII's ban on religious discrimination affronted the Establishment Clause of the First Amendment. After unsuccessfully petitioning for rehearing (Pet. App. F), petitioner filed its petition for a writ of *certiorari* in this Court, and on March 1, 1976, that petition was granted to consider, among other questions, the issue of the constitutionality of the statute as construed and applied by the Sixth Circuit.

The International Association of Machinists and Aerospace Workers [hereinafter, "IAM"] respectfully submits this brief as *amicus curiae* in support of the position that the judgment of the Court of Appeals be reversed.

¹ Respondent's claim was first considered and rejected by the Kentucky Commission on Human Rights. The decision of that body is reproduced in the Appendices to the Petition for a Writ of *certiorari* as Appendix A at pp. 1a-6a. Hereinafter, "Pet. App." refers to the Appendices attached to the petition.

INTEREST OF THE IAM

As the duly designated representative of almost a million workers, the IAM has a substantial interest, and, in fact, a duty to assure that all whom it represents are treated fairly. *E.g., Steele v. Louisville & N.R.R.*, 323 U.S. 192 (1944). If the decision of the court of appeals is left to stand, however, it is inevitable that the rights of the majority will of necessity have to be subordinated to the religious beliefs of a minority, no matter how meritorious an accommodation to those interests may be, for under the court of appeals decision, hindsight is the best sight. While the IAM submits that Title VII's ban on religious discrimination is a laudable restriction on private employment relationships, that ban as construed by the court of appeals, has become "a sword to cut through the strictures of the Establishment Clause" (Pet. App. D at 49a) and through the legitimate interests and rights of other employees.

This Court's decision on the issues *sub judice* is likely to have a significant impact upon the interpretation of Title VII of the Civil Rights Act of 1964, as amended, and thus upon the rights and duties of employees and employers under that Act. In discharge of its statutory duty to represent the interests of all employees within its jurisdiction, minority as well as majority, the IAM is respectfully submitting this brief to urge this Court to construe Title VII's ban on religious discrimination so as to protect the free exercise of religion, but without affronting the freedom of others—employers and employees—not to support those religious beliefs.

STATEMENT OF THE CASE

The case *sub judice*, as will be developed more fully by petitioner in its brief, squarely presents a situation where an employer had evenly applied and enforced a work related rule until being confronted by respond-

ent Paul Cummins' demand that the rule yield to his religious beliefs. That rule—that all supervisors be available for work when their shifts work—clearly aided Parker Seal in the conduct of its business. Respondent, however, claimed in 1970 (after five years of consistently abiding by that rule; but shortly after adopting the tenets of the World Wide Church of God) that since that rule required that he work on Saturdays, and since his religion prohibited him from working Friday sunset to Saturday sunset, petitioner could not enforce that rule for to do so would conflict with his religious beliefs. Parker Seal attempted to accommodate to respondent's religious practices, but in so doing caused problems to its efficient operations, and more importantly *amicus* submits, created dissension among respondent's fellow supervisors who were required to fill the gap in petitioner's operations left by respondent's observance of his religious beliefs.

In concluding that petitioner had Violated Title VII in discharging respondent because of his unavailability for work on Saturdays, a majority of the court of appeals concluded, in effect, that petitioner could not enforce work related rules if an operation of those rules placed a burden on an employee's exercise of his religious beliefs. Finding that petitioner could have taken other steps to alleviate the problems caused by respondent's unavailability for work on Saturday,² the appellate court concluded that, as a matter of law, the company had not complied with the commands of Title VII, which under the court of appeals view, required petitioner to shield respondent from the burdens of his religious beliefs. *See*, Pet. App. D at

² According to the court of appeals, petitioner could have required respondent to work overtime during the week or on Sunday, or it could have reduced his pay accordingly. Pet. App. D at 29a; *but see*, Pet. at 14 n.8.

35a. Discounting the strength of the dissension among respondent's fellow employees, including his own brother-in-law, the appeals court reasoned that while it was "conceivable that employee morale problems could become so acute that they would constitute an undue hardship [,]" the facts in this case did not rise to that level. Pet App. D at 29a. Apparently, as the court noted, only "chaotic personnel problems" would cause an undue hardship under either 29 C.F.R. § 1605.1 or Section 701(j) of Title VII. *Id.* Even though the court of appeal's view of Section 701(j)³ required an employer to discriminate against its other employees because of respondent's religious beliefs, a majority of that panel concluded that the accommodation requirement did not affect the Establishment Cause of the First Amendment.

Unfortunately, the Sixth Circuit in *Cummins* is not alone in its view of the reach of Title VII. *See*, *Hardison v. Trans World Airlines, Inc.*, 527 F.2d 33 (8th Cir 1975), *pets. for cert. pending*. Under the approach to Title VII taken by the *Cummins* Court, rules which have been developed over the years to govern the employment relationship, such as *bona fide* seniority provisions, and which have been evenly applied and enforced must be waived for those who claim that those rules interfere with the exercise of their religious beliefs. This interpretation of Title VII does not, it is submitted, simply extend the First Amendment protection of the free exercise of religion to private employment; it expands those protections to require others "to pay" for another's exercise of religion. This forced payment may be in the form of forced overtime,

³ Although respondent's discharge occurred prior to the enactment of Section 701(j), 42 U.S.C. § 2000e(j), the court of appeals considered the constitutionality of that section since, as it stated, "for purposes of this case there is no difference between the Regulation [§ 1605.1] and the amendment." Pet. App. D at 19a. *Amicus* agrees.

loss of weekends off or, in the case of union shop agreements, actual financial support of another's union representation when that employee refuses to pay "dues" because of religious beliefs.

ARGUMENT

I. WHILE CONGRESS MAY LAWFULLY REQUIRE EMPLOYERS AND EMPLOYEES TO NOT DISCRIMINATE AGAINST OTHER EMPLOYEES BECAUSE OF THEIR RELIGIOUS BELIEFS, CONGRESS IS PROHIBITED BY THE ESTABLISHMENT CLAUSE FROM REQUIRING THAT EMPLOYERS OR EMPLOYEES PAY FOR THE RELIGIOUS BELIEFS OF OTHER EMPLOYEES BY ACCOMMODATING THOSE BELIEFS.

Aware that among the inalienable rights enjoyed by all men are the freedoms of conscience and religion, and realizing that those rights could be abridged by the involvement of the State in religious affairs, the founding fathers provided that: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof" U. S. CONST. amend. I. By that provision with its inherent tension between both prongs, the founding fathers attempted to erect a wall of separation between church and state. However, as the history of the enforcement of the Religious Clauses clearly evidences, there is no ready test to determine with mathematical certainty when either Congress, or the States through the Fourteenth Amendment, have breached that wall of neutrality—a wall which at its best is loosely formed.⁴ *E.g., Lemon v. Kurtzman*, 403 U.S. 602, 612, 614 (1971).

Over the years this Court has developed a three-pronged test to determine whether a legislative enact-

⁴ As this Court stated in *Committee For Public Education v. Nyquist*, 413 U.S. 756, 760 (1973): "It has never been thought either possible or desirable to enforce a regime of total separation, and as a consequence cases arising under these Clauses have presented some of the most perplexing questions to come before this Court."

ment, or a judicial interpretation of that act, violates the Establishment Clause. In order to pass muster under the Establishment Clause:

First, the statute must have a secular legislative purpose. . . . Second, it must have a "primary effect" that neither advances nor inhibits religion. . . . Third, the statute and its administration must avoid excessive government entanglement with religion. *Meek v. Pittenger*, 421 U.S. 349, 358 (1975).

But as the Court warned in *Meek, supra*, 421 U.S. at 359: "[T]he tests must not be viewed as setting the precise limits to the necessary constitutional inquiry, but serve only as guidelines with which to identify instances in which the objectives of the Establishment Clause have been impaired." In essence, the three-pronged test is a balancing one in which this Court ultimately determines whether the government has become involved in religious affairs so as to place its force and power behind the demand of one group that others support by actions, sacrifice or "taxes" the religious beliefs of the demanding group.⁵ *Amicus* respectfully

⁵ That the essence of the Religious Clauses is the prohibition on the government from requiring some to pay for the religious beliefs of others, is inferable from the precursor to the First Amendment religious prohibitions, the Bill for Establishing Religious Freedom enacted by Virginia in 1786. That Act provided in pertinent part:

Well aware that Almighty God hath created the mind free; . . . that to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical; . . .

We, the General Assembly, do enact, That no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burdened in his body or goods, nor shall otherwise suffer, on account of his religious opinions or belief . . .

See, Everson v. Board of Education, 330 U.S. 1, 28 (1947) (Rutledge, J. dissenting).

submits that the tension between the two clauses of the Religious Clauses is never so taut, and consequently the caveat of *Meek* never so critical, as when Congress enacts a law to prohibit religious discrimination. Since Title VII is such a law, it must be examined closely to determine if Congress exceeded its permissible bounds.

A. History of Title VII's ban on religious discrimination.

When Congress was considering the various precursors to, and then the bill itself which eventually was enacted into law as the Civil Rights Act of 1964, 78 Stat. 241 (1964), it is fair to say that Congress was mainly, if not primarily, concerned with racial discrimination. For example, the Chairman of the House Judiciary Committee, Representative Celler, stated:

We had testimony concerning religion. We did not have very much testimony of discrimination on the grounds of religion. You will notice in one of the titles, religion is left out.

We had very little evidence—I do not think we had any of it insofar as the Committee on the Judiciary is concerned that any particular sect or religion had been discriminated against. 110 Cong. Rec. 1528 (1964). *See also, Id.* at 1529.

From *amicus'* review of the congressional material, it appears that Representative Celler's experience was indicative of that of the other Committees involved; but yet when "religion" was added to prohibited subjects of discrimination, it was routinely included. While there was much evidence of racial discrimination, by statistics and direct evidence, there was little testimony relating to religious discrimination. *See, Hearings on S. 773, S. 1210, S. 1211, and S. 1937 Before Subcommittee on Employment and Manpower of the Senate Committee on Labor and Public Welfare, 88th Cong.,*

1st Sess. at 196-208, 431-62 (1963). When Congress was presented with evidence of religious discrimination, that evidence apparently pertained to overt and intentional discrimination. *Id.* at 464-65. Congress gave considerable thought to whether it had the authority to prohibit racial discrimination in private employment (*e.g., Id.* at 127-33), but there is little, if any, evidence that Congress considered whether the Establishment Clause limited its power to prohibit religious discrimination.

Almost a year after Title VII became effective, the EEOC issued guidelines to cover compliance with Title VII's ban on religious discrimination. 31 Fed. Reg. 8370 (1966). In those guidelines, the Commission stated that an employer could be in violation of Title VII if it failed to accommodate the "reasonable religious need of employees . . . where such accommodation can be made without serious inconvenience to the conduct of the business." *Id.* That regulation, however, specifically limited the duty to accommodate:

[T]he Commission believes that an employer is free under Title VII to establish a normal work week . . . generally applicable to all employees, notwithstanding that this schedule may not operate with uniformity in its effect upon the religious observances of his employees

See also, Id. at § 1605.1(b)(3). In July 1967, the Commission issued new guidelines on religion which are still in effect. 29 C.F.R. § 1605.1. Under those new regulations, an employer has a duty "to make reasonable accommodations to the religious needs of employees . . . where such accommodations can be made without undue hardship on the conduct of the employer's business." Section 1605.1(b). But, instead of attempting to lay down specific guidelines as it had done before, the Commission stated that it would review each case on an individual basis (Section 1605.1

(d)), and that the burden was on the employer to prove that "an undue hardship renders the required accommodations to religious needs of the employee unreasonable." Section 1605.1(c).

As could be expected, the 1967 regulation received a mixed response from the courts. *Compare, Dewey v. Reynolds Metals Co.*, 429 F.2d 324 (6th Cir. 1970), *aff'd by an equally divided Court*, 402 U.S. 689 (1971), *with, Reid v. Memphis Publishing Co.*, 468 F.2d 346 (6th Cir. 1972). Confronted with what he believed to be a threat to the full permissible reach of Title VII's ban on religious discrimination, Senator Randolph on January 21, 1972, introduced an amendment on the Senate floor to S. 2515, the bill which eventually became the Equal Employment Opportunity Act of 1972, 86 Stat. 103 (1972). Senator Randolph proposed that, in order to carry "through the spirit of religious freedom under the Constitution of the United States" (118 Cong. Rec. 706 (1972)), a new subsection be added to Section 701, the definitional section of Title VII:⁶

(j) The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's, religious observance or practice without undue hardship on the conduct of the employer's business. 118 Cong. Rec. 705 (1972).

This amendment was necessary, Senator Randolph stated, because the courts, including this Court in

⁶ Senator Randolph's amendment was couched in definitional terms apparently to counter the contention of the Sixth Circuit in *Dewey v. Reynolds Metals Co.*, *supra*, 429 F.2d at 335, that:

The fundamental error of *Dewey* and the *Amici Curiae* is that they equate religious discrimination with failure to accommodate. We submit these two concepts are entirely different. The employer ought not to be forced to accommodate each of the varying religious beliefs and practices of his employees.

Dewey, had not given Title VII's ban on religious discrimination its full and proper reach. As the Senator said:

I think in the Civil Rights Act we thus intended to protect the same rights in private employment as the Constitution protects in Federal, State, or local governments. Unfortunately, the courts have, in a sense, come down on both sides of this issue. The Supreme Court of the United States, in a case involving the observance of the Sabbath and job discrimination, divided evenly on this question.

This amendment is intended, in good purpose, to resolve by legislation—and in a way I think was originally intended by the Civil Rights Act—that which the courts apparently have not resolved. I think it is needed not only because court decisions have clouded the matter with some uncertainty; I think this is an appropriate time for the Senate, and hopefully the Congress of the United States, to go back, as it were, to what the Founding Fathers intended. 118 Cong. Rec. 705-06 (1972).

Senator Randolph's amendment was accepted, and it became law when the Equal Employment Opportunity Act of 1972 was enacted on March 24, 1972. As is readily apparent from comparison of Section 701(j) and 29 C.F.R. § 1605.1(b) and (c), Senator Randolph's amendment codified the challenged EEOC regulation.

While Section 706(g) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(g), implies that Title VII prohibits only intentional discrimination, this Court has made clear in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), that Title VII is not directed simply to the motivation of employment practices; "the thrust of the Act [is directed] to the *consequences* of employment practices . . ." *Id.* at 432 (emphasis in original).

Congress did not intend by Title VII, however, to guarantee a job to every person regardless of

qualifications. . . . Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed. What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification. *Id.* at 430-31.

Under this formulation of the reach of Title VII, a work rule which is neutral on its face may yet be discriminatory if in operation it acts to exclude members of a protected group. However, where a work rule is reasonably job related, it is not unlawful since a rule which measures the man for the job, and not the man in the abstract, is proper. *Id.* at 436.

Section 701(j), however, goes further. Under the accommodation requirement of that section, a work rule which is clearly job related (such as in the case at bar) and evenly applied and enforced, may be in violation of Title VII if the employer or union does not reasonably attempt to avoid curtailing the employee's religious beliefs. Consequently, under the accommodation requirement, employers and unions are forced to discriminate in favor of an employee's religious beliefs. *Amicus* IAM submits that such a requirement is contrary to the commands of the Religion Clauses.

B. Title VII's accommodation requirement is actually a command that employers and unions yield to all claims of alleged discrimination because of religious beliefs, regardless of their merit.

As it may now be read, and as it has recently been construed by both the court of appeals in this case⁷

⁷ See also, *Hardison v. Trans World Airlines, Inc.*, 527 F.2d 33 (8th Cir. 1975), *pets. for cert. pending*, Sup. Ct. Nos. 75-1126, 75-1385; but see, *Johnson v. U.S. Postal Service*, 497 F.2d 128 (5th Cir. 1974).

and the EEOC in its current regulation and its decisions,⁸ Title VII's ban on religious discrimination effectively requires an employer and a union to yield to an employee's religious beliefs, no matter how onerous that demand may be upon their operations. This is so because under the present state of the law, there are no hard and fast guidelines in this area,⁹ and each instance of a refusal to yield by either an employer or union is liable to be subjected to the long and drawn out review procedures of both the EEOC and the courts.¹⁰ And since the burden is on the employer and the union to prove the negative—i.e., that *no* reasonable accommodation imaginable was possible—the chances of ultimately prevailing on the merits are, at best, minimal. If what was believed to have been unreasonable is subsequently found through hindsight to not have gone far enough in accommodating, both employer and union may well be required to pay a large judgment in back pay and costs—including attorney's fees—even though there was no intent to discriminate because of religion, and even though the employee was treated the same as every other employee. *Albemarle Paper Co. v. Moody*,

⁸ See, decisions cited at Pet. App. D at 29a.

⁹ Compare, *Yott v. North American Rockwell Corp.*, 501 F.2d 398 (9th Cir. 1974), with, *Linscott v. Millers Falls Co.*, 440 F.2d 14 (1st Cir.), *cert. denied*, 404 U.S. 872 (1971).

¹⁰ This case demonstrates that the delay can be long; and the IAM respectfully submits that the delay in this case is far from unusual. In its Seventh Annual Report, the EEOC reported that for that fiscal year ended June 30, 1972, it has received 32,840 new charges. *Id.* at 36. During that year the Commission completed 10,668 cases and had 38,524 in progress at the end of the year. *Id.* In its Ninth Annual Report, the Commission stated that for the fiscal year ended June 30, 1974, it had received 56,000 charges, and had 78,400 on hand at the close of that year. *Id.* at 47. In that annual report the Commission stated that it hoped to reduce the average time required to process a charge from 26 months to 13 months. *Id.* at 8.

422 U.S. 405 (1975). Moreover, the realities of the situation and alternatives confronting employers and unions when an employee demands that his religious beliefs take precedence over normal work related rules, may well force employers and union inevitably to yield to those religious beliefs.

A clear example of the reach of accommodation requirement as construed by the court of appeals below is *Yott v. North American Rockwell Corp.*, *supra* note 9. In *Yott*, the Ninth Circuit was confronted with a challenge to a 'union shop' provision which *Yott* claimed violated his religious beliefs not to join a union or support one by dues. Objections to union shop agreements on religious principles is not a recent innovation of Title VII, but rather presents a question which has previously been raised and rejected under the Free Exercise Clause. *E.g.*, *Otten v. Baltimore & O. R. R.*, 205 F.2d 58 (2d Cir. 1953); *Wicks v. Southern Pacific Co.*, 231 F.2d 130 (9th Cir.), *cert. denied*, 351 U.S. 946 (1956); *Gray v. Gulf, M. & O. R. R.*, 429 F.2d 1064 (5th Cir. 1970), *cert. denied*, 400 U.S. 1001 (1971); *Linscott v. Millers Falls Co.*, *supra* note 9; *Hammond v. Papermakers Union*, 462 F.2d 174 (6th Cir.), *cert. denied*, 409 U.S. 1028 (1972). Union shop agreements, which were in reality an accommodation of religious beliefs because of their limited enforcement rights, *e.g.*, *NLRB v. Hershey Foods Corp.*, 513 F.2d 1083 (9th Cir. 1975), were found to be constitutional because the compelling governmental interest in requiring that all employees pay their fair share for union representation outweighed the individual right to the unrestricted exercise of his religion. *See*, *Linscott v. Millers Falls Co.*, *supra* note 9, 440 F.2d at 17-18.

Even though it agreed that the Free Exercise Clause did not prohibit *Yott*'s employer from enforcing that

agreement, the *Yott* court concluded that Title VII's accommodation requirement might. *Yott v. North American Rockwell Corp.*, *supra* note 9, 501 F.2d at 401-03. *Yott* thus clearly shows that the accommodation requirement of Section 701(j) may be construed to extend Title VII's protections past those guaranteed by the Free Exercise Clause and to require other employees to pay for an employee's exercise of his religion.

C. Title VII's accommodation requirement violates the position of neutrality required by the First Amendment.

Amicus does not quarrel with the concept that Congress could lawfully, through the commerce clause, prohibit religious discrimination in the private employment context. But since the reach of the Free Exercise Clause is limited by the Establishment Clause, Congress could do no more than simply extend the First Amendment protections for the free exercise of religious beliefs to private employment. And if this is what Congress has in fact accomplished, the test for determining free exercise questions set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963), would, at first, appear applicable. In *Sherbert*, as in *Griggs*, this Court concluded that a neutral requirement—disqualification for unemployment benefits due to not being available for work on Saturdays—operated to impose a burden on *Sherbert*'s free exercise of her religion. *Id.* at 403-06. That, however, did not end the inquiry for the free exercise right is not absolute and may be subordinated to a compelling governmental interest. While a mere rational relationship will not suffice to show a compelling state interest, the state is not required to show that all other forms of state action to achieve that end are entirely impractical. *See Braunfeld v. Brown*, 336 U.S. 599 (1961). That, however, is exactly what

the accomodation requirement, as construed by the court of appeals, requires

While it is clear that Congress, because of the tension inherent in the Religion Clauses, could do no more than extend the Free Exercise Clause protections to private employment, a serious question arises as to whether Congress could go even that far in the private employment context. Unlike a State, an employer and his employees have a right to the free exercise of their religious beliefs, and its corollary, the right to be free from supporting another's religious practices. Since a strict application of the "compelling State interest" test of *Sherbert* to private employment, rather than the "rational basis" standard of the Equal Protection Clause, will cause discrimination *in favor* of an employee's religious beliefs and, will have a direct and identifiable effect on fellow employees and the employer, its application vitiates the Government's position of neutrality required by the Religion Clauses. *Accord, Committee For Public Education v. Nyquist*, *supra* note 4, 413 U.S. at 788-89. Moreover, governmental entanglement in religion becomes the rule, rather than the exception. In the case at bar, Congress in enacting Section 701(j), the EEOC in promulgating § 1605.1, and the court of appeals below in upholding those actions, have all failed "to maintain an attitude of 'neutrality,' neither 'advancing' nor 'inhibiting' religion." *Id.* at 788 (footnote omitted).

When the three-pronged test for the constitutionality of an enactment under the Establishment Clause is applied to this case, it becomes clear, *amicus* submits, that the accommodation requirement of the regulation and § 701(j) cannot stand. While it is apparent that Title VII's religious discrimination ban in both Sections 701(j) and 703 (42 U.S.C. § 2000e-2) is intended to remove a form of invidious discrimination from the

employment equation, *cf., Griggs v. Duke Power Co.*, *supra*, 401 U.S. at 429-30, it is also clear that the act was intended "to assure that freedom from religious discrimination in the employment of workers is for all time guaranteed by law" Remarks of Senator Randolph, 118 Cong. Rec. 705 (1972). Title VII's religion provisions, consequently, are not strictly secular in purpose for one of their main purposes is to aid the exercise of religious practices. That realization, however, does not condemn Title VII's religion provisions for, it is submitted, the Free Exercise and the Equal Protection clause may permit a law to implement their commands. This religious purpose, though, is an important factor to be weighed in the final balancing of whether the government's neutrality has been lost by the Act.

When the second prong of the Establishment Clause test is applied, it becomes obvious that a direct effect of the accommodation requirement is to advance religious beliefs.¹¹ The avowed intent of the 1972 amendment was to permit workers with religious beliefs requiring that they observe their Sabbath on days other than Sunday, the opportunity to follow their conscience even though it interfered with an employer's normal and evenly enforced work rules. *See*, Remarks of Senator Randolph, 118 Cong. Rec. 705-06 (1972). Moreover, the sponsor of that amendment indicated that it was prompted partly by the falling attendance at certain religious services. *Id.* at 705. While it is true

¹¹ *Amicus* submits that the Establishment Clause prohibits advancement of religious beliefs, as well as advancement of organized religions. "Religion" is used only once in the Religion Clauses and since under the Free Exercise Clause it refers to all forms of religious practices and beliefs, *Gillette v. United States*, 401 U.S. 437 (1971), so too must that be its meaning in the Establishment Clause. *See, Everson v. Board of Education*, *supra* note 5, 330 U.S. at 31-33 (Rutledge, J. dissenting).

that the primary effect of Title VII's general religion provisions in Section 703 is against discrimination, the same is not true for the accommodation provision of that Act; the *sole* effect of such a provision is to advance the religious beliefs of those demanding its enforcement. This, *amicus* submits, is contrary to the Establishment Clause.

This conclusion is buttressed by the third prong of the test. In its decision in the case at bar, the court of appeals concluded that neither the regulation nor the amendment raised the "spectre of excessive government entanglement with religion." Pet. App. D. at 38a. *Amicus* respectfully disagrees with that conclusion. *See*, p. 16, *supra*. Moreover, in reaching that conclusion, the appellate court failed to consider "one of the principal evils against which the First Amendment was intended to protect." *Lemon v. Kurtzman*, *supra*, 402 U.S. at 622. And that was the "entanglement in the broader sense of continuing political strife." *Committee For Public Education v. Nyquist*, *supra*, 413 U.S. at 794; *Meek v. Pittenger*, *supra*, 421 U.S. at 372. In all three of the above cases, this Court recognized the potential divisiveness of conflict over religious matters, and the need to avoid either the government's entanglement in such matters, or the government creating situations in which conflict along religious lines is probable.

In the case at bar, the accommodation requirement caused dissension among the employees over respondent receiving special treatment because of his religious beliefs. Surely, such dissension can seriously endanger morale, even if it does not reach "chaotic personnel problems," as long as the demands of justice are ignored. *Accord*, *United States v. Lowden*, 308 U.S. 225, 236 (1939). But more importantly, the Establishment Clause was intended to prevent such dissension from

being created in the first place by governmental action, irrespective of whether it reached chaotic proportions. The conflict among employees which has already arisen in the case at bar, and which very probably will arise again when an employee, because of his religious beliefs, is granted preferential treatment,¹² "compels the conclusion that . . . [Section 701(j) as interpreted by the court of appeals] violates the constitutional prohibition against laws 'respecting an establishment of religion.'" *Meek v. Pittenger*, *supra*, 421 U.S. at 372.

D. Title VII's ban on religious discrimination is not unconstitutional; only the accommodation provisions violate the Religious Clauses.

In arguing that Title VII's religious accommodation provision violates the First Amendment, *amicus* IAM wishes to emphasize that it is not suggesting that Section 703 of Title VII, as amended, is unconstitutional in prohibiting religious discrimination. *Amicus curiae* respectfully submits that Congress may properly prohibit discrimination because of religion in private employment, but as we have argued above, the tension between the Religion Clauses of the First Amendment does not permit *discrimination in favor of religious beliefs*. The facts of the case at bar demonstrate the inadvisability and impropriety of the government attempting to prohibit all burdens in employment caused by an individual's religious beliefs. By protecting respondent from the burdens of his religious beliefs, Title VII's accommodation

¹² Dissension among employees over preferential treatment is a very real factor because items such as seniority rights, including such benefits as weekends off, are jealously guarded and frequently cause conflicts. *See generally*, *American Airlines, Inc. v. CAB*, 445 F.2d 891 (2d Cir. 1971), *cert. denied*, 404 U.S. 1015 (1972). This problem becomes more susceptible for explosion when religion is added to the mixture.

provision required both the company and respondent's fellow supervisors to pay for his religious practices by loss of efficiency on the part of the employer, and worsened working conditions for the fellow employees.

Amicus IAM is not unsympathetic to respondent's plight. The IAM realizes that the position it advocates requires respondent to find employment where he does not have to work on his Sabbath or else forego his religious principles. This may be a painful choice, but as Judge Learned Hand wrote in an analogous situation:

We must accommodate our idiosyncrasies, religious as well as secular, to the compromises necessary in communal life; and we can hope for no reward for the sacrifices this may require beyond our satisfaction from within, or our expectations of a better world. *Ottens v. Baltimore & O. R. R.*, *supra*, 205 F.2d at 61.

"The Constitution decrees that religion must be a private matter for the individual, the family, and the institutions of private choice, and that while some involvement and entanglement are inevitable, lines must be drawn." *Lemon v. Kurtzman*, *supra*, 403 U.S. at 625; *see also*, *Committee For Public Education v. Nyquist*, *supra*, 413 U.S. at 788-89.

II. THIS COURT IN THE EXERCISE OF ITS SUPERVISORY POWERS SHOULD SET FORTH GENERAL GUIDELINES IN ITS DECISION BY WHICH EMPLOYERS, UNIONS AND EMPLOYEES WILL BE ABLE TO GAUGE THEIR RIGHTS AND DUTIES UNDER TITLE VII'S BAN ON RELIGIOUS DISCRIMINATION.

At the present time the law in the area of Title VII's ban on religious discrimination is, to say the least, unsettled. Organizations such as the IAM which represent employees throughout the United States are presently in a precarious position because their rights and duties under Title VII in this area vary from Circuit to

Circuit, and even from panel to panel within Circuits. *Compare*, *Hardison v. Trans World Airlines, Inc.*, *supra*, with *Reid v. Memphis Publishing Co.* [*Reid II*], 521 F.2d 512 (6th Cir. 1975), *pet. for cert. pending*; and, *Johnson v. U.S. Postal Service*, *supra*. *See also*, *Yott v. North American Rockwell*, *supra* note 9; *McDaniel v. Essex International, Inc.*, W.D. Mich. No. G74-288 C.A., *appeal pending* (attached hereto as Appendix A). Hopefully, this Court's decision in the case *sub judice* will shed some light on an otherwise confused area.

If this Court should accept *amicus* IAM's position that only Section 701(j) and Regulation § 1605.1 are unconstitutional, Title VII through Section 703 will still provide an effective tool to prohibit religious discrimination. Under that remaining section, employers, unions and employment agencies will be prohibited from discriminating against an employee or a prospective employee because of his religious beliefs. And, as is the case in those situations involving charges under Section 703 for racial or other forms of discrimination, the employee bears the initial burden of establishing a *prima facie* case. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). Even under *amicus*' suggested approach to this case, accommodations are not immaterial, for under the rationale of *Albemarle Paper Co. v. Moody*, *supra*, 422 U.S. at 425, evidence of a failure to attempt an accommodation may be circumstantial evidence of an intent to discriminate in appropriate circumstances.

If on the other hand this Court should conclude that Title VII's accommodation requirement is constitutional, *amicus* still urges this Court to reconsider the burden of proof requirement imposed by Regulation § 1605.1(c). As *amicus* has argued above, *supra* pp. 12-14, that section of the regulation and its application by

the court of appeals below require an employer or union to prove a negative, an impossible burden. Moreover, an employer's or a union's defense may be effectively rebutted by a showing of any form of "reasonable" accommodation even though it had not been considered and rejected by the employer or the union at the time of the alleged discriminatory act.

Amicus curiae respectfully suggests that, in the event that this Court rejects the IAM's argument on the constitutionality of Section 701(j), it apply the burden of proof formulation set forth in *McDonnell Douglas* and *Albemarle* to religious discrimination cases. *Amicus* submits that in light of the almost dearth of evidence of religious discrimination, *e.g.*, 110 Cong. Rec. 1529 (1964), there is no support for the EEOC's position in the regulation, § 1605.1(c), that due to the "particularly sensitive nature of discharging or refusing to hire an employee . . . on account of his religious beliefs," the employer must bear the burden of proof. *Amicus* IAM submits that the area of religious discrimination is today no more "sensitive" than that of racial discrimination; and since the *McDonnell Douglas*—*Albemarle* standard does not place the burden on a defendant in racial cases, there is no rational basis to do so in cases involving religious discrimination. *Cf.*, *Reed v. Reed*, 404 U.S. 71 (1971).¹³ Moreover, employers and unions should not be required to disprove the reasonableness of accommodations suggested *after* the alleged discriminatory act. Under the rationale of *Albemarle*, the defending parties could show that their suggested accommodation was reasonable, and then it would be open to the complaining party to show that other accommodations would serve an employer's legitimate purposes

¹³ Section 701(j) is not a barrier to the removal of this irrational burden for it is subject to the same attack on its allocation of the burden of proof as is the EEOC regulation.

just as well. This would merely be rebuttal evidence attempting to show that the defending party's suggested accommodation was a "pretext" for discrimination." *Albemarle Paper Co. v. Moody, supra.*, 422 U.S. at 425.

CONCLUSION

Amicus Curiae IAM respectfully suggests that the judgment of the Court of Appeals be reversed.

Respectfully submitted,

JOHN O'B. CLARKE, JR.
WILLIAM G. MAHONEY
1015 Eighteenth Street, N. W.
Washington, D. C. 20036

PLATO E. PAPPS
General Counsel, International
Association of Machinists
and Aerospace Workers
1300 Connecticut Ave., N.W.
Washington, D. C. 20036

*Counsel for International
Association of Machinists
and Aerospace Workers*

Of Counsel:

HIGHSAW, MAHONEY & FRIEDMAN
1015 Eighteenth Street, N.W.
Washington, D. C. 20036

May 15, 1976

APPENDIX

APPENDIX A

UNITED STATES OF AMERICA
IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

(Filed January 13, 1976)

K74-288 C.A.

DORIS McDANIEL, *Plaintiff*,

v.

ESSEX INTERNATIONAL INC., aka
ESSEX WIRE, a Michigan corporation, and INTERNATIONAL
ASSOCIATION OF MACHINISTS, LOCAL LODGE No. 982,
Defendants.

Opinion

Plaintiff Doris McDaniel brought suit against her employer, Essex International, Inc., and the union which, under the National Labor Relations Act, represented employees in the bargaining unit in which plaintiff accepted employment at Essex on October 15, 1972. In her suit, plaintiff, a member of the Seventh-Day Adventist Church, claimed that the union's enforcement of a "union shop" agreement with Essex violated plaintiff's rights under the United States Constitution, Title VII of the Civil Rights Act of 1964, as amended, and the Constitution and Fair Employment Practices Act of the State of Michigan. After considering plaintiff's complaint and the exhibits filed with her brief in opposition to defendants' motion to dismiss, this court concludes that as a matter of law, plaintiff has failed to state a claim upon which relief may be granted.

When plaintiff accepted employment at Essex, the company and Local Lodge 982 of the International Association of Machinists and Aerospace Workers had a collective bar-

gaining agreement in effect which contained a union security agreement authorized by Sections 8(a)(3) and 8(b)(2) of the National Labor Relations Act, 29 U.S.C. §§ 152(a)(3), (b)(2). That agreement provided that all employees represented by Local 982, as a condition of continued employment, had to become a member of the union within forty-five days of hire. If an employee failed to abide by that agreement, the company had to discharge that employee within three days of a request by the union. Plaintiff, because of her religious beliefs, refused to pay her full dues to the union, offering instead to pay an amount equivalent to her periodic union dues to a non-religious charity. Local 982 declined that offer. After being warned of the consequences of her continued refusal, plaintiff persisted in her refusal to pay the full dues and was discharged on December 28, 1972. Plaintiff was not required to join the union nor was she asked to adopt its ideological principles.

While plaintiff has based her constitutional challenge on several amendments to the Federal Constitution, only plaintiff's First Amendment challenge merits discussion. An identical argument based upon the First Amendment's protection of the free exercise of one's religion was made and rejected in *Hammond v. United Paperworkers Union*, 462 F.2d 174 (6th Cir.), cert. denied, 409 U.S. 1028 (1972). In *Hammond*, this court rejected a challenge by a member of the Seventh-Day Adventist Church to the enforcement of a union shop agreement because, upon balance, the strong governmental interest in authorizing union shop agreements was found to be compelling and controlling over the right of the individual to the free exercise of religious beliefs. That conclusion was affirmed on appeal. That same balancing of competing interests requires that plaintiff's First Amendment claim be dismissed.

Since unions have the duty to represent all members of their bargaining unit regardless of their union affiliation, *Steele v. Louisville & N.R.R.*, 323 U.S. 192, 201-02 (1944),

Congress concluded that *all* members of the bargaining unit should pay their "fair share" of the costs of securing benefits for, and of representing members of that bargaining unit. *Railway Employees' Dept. v. Hanson*, 351 U.S. 225, 231 (1956). Besides eliminating "free riders," the requirement that all employees represented by a union pay dues to that union serves the important purposes of counterbalancing the economic power of the corporate structure, and of removing the disruptive effects of union members being required to share their achievements. See, *Linseott v. Millers Falls Co.*, 440 F.2d 14, 18 n.3 (1st Cir.), cert. denied, 404 U.S. 872 (1971). All of those purposes of union shop agreements serve the valid Congressional interest in promoting industrial peace along the arteries of commerce. *International Assoc. of Machinists v. Street*, 367 U.S. 740 (1961); cf., *United States v. Lowden*, 308 U.S. 225 (1939). But mindful of the interests of the individual employees, Congress did not authorize a complete form of union shop. It "whittled down [the 'membership' requirement] to its financial core"¹ by permitting enforcement of a union shop agreement only to require employees to pay dues to the union. See, *NLRB v. Hershey Foods Corp.*, 513 F.2d 1083 (9th Cir. 1975). Union dues required under a union shop agreement, thus, "simply constitute a 'tax' in support of the collective bargaining efforts of the union." *Gray v. Gulf, M. & O. R.R.*, 429 F.2d 1064, 1072 (5th Cir. 1970), cert. denied, 400 U.S. 1001 (1971). Consequently, any infringement upon an individual's free exercise of her religion is limited and must be subordinate to the compelling governmental interest in favor of such a tax.

Plaintiff's addition of a claim under Title VII of the Civil Rights Act of 1964, as amended, does not require a different result. Union shop agreements and their even-handed enforcement serve a necessary "business purpose" of unions. Requiring a union to waive its right to have all

¹ *NLRB v. General Motors Corp.*, 373 U.S. 734, 742 (1963).

pay their "fair share" would be an undue hardship upon the union and its other members. Moreover, the "accommodation" required by Section 701(j), 42 U.S.C. § 2000e(j), is the same as that required under the First Amendment by the balancing of interests test used in *Hammond*. Congress effected the reasonable accommodation required by Title VII when it balanced the competing interests in enacting the union shop provisions of the Taft-Hartley Act of 1947. 29 U.S.C. §§ 158(a)(3), (b)(2).²

Since defendants are entitled to judgment on the merits as a matter of law, their motions in the nature of motions for summary judgment will be granted.

Dated: January 13th, 1976.

/s/ NOEL P. FOX

Chief District Judge

² Plaintiff's claim under the laws of the State of Michigan must also fail for those laws parallel both the U.S. Constitution and Title VII. Since plaintiff has failed to state a claim under federal constitutional or statutory law, she has also failed to state a claim under the Michigan Constitution and Fair Employment Practices Act.

UNITED STATES OF AMERICA
IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

G74-288 C.A.

DORIS McDANIEL, *Plaintiff*,

v.

ESSEX INTERNATIONAL INC., aka
ESSEX WIRE, a Michigan corporation, and INTERNATIONAL
ASSOCIATION OF MACHINISTS, LOCAL LODGE No. 982,
Defendants.

**Opinion Denying Motion for Rehearing and Partially
Modifying the Judgment**

On January 13, 1976, this court issued an opinion and order granting summary judgment to defendants in a suit alleging religious discrimination in the collection of union dues pursuant to a "union shop" agreement. Plaintiff filed a timely motion for rehearing, assigning numerous errors. In addition, the United States Equal Employment Opportunity Commission requested leave to file a brief as *amicus curiae*.

After carefully reviewing the plaintiff's motion and supporting memoranda, this court concludes that no useful purpose would be served by granting a rehearing. With the single exception noted below, the court reaffirms its original ruling. The motion of the EEOC for leave to file an *amicus* brief is denied; the agency's views can more appropriately be addressed, at this juncture, to the Court of Appeals.

In light of plaintiff's arguments, the court has reconsidered its disposition of the pendent state claims. Accordingly, the original judgment is modified by deletion of footnote 2 from page 4 of the opinion. Since relief has been denied on the federal claim, and since the pendent

claim concerns unresolved questions of state law, this court declines to exercise its jurisdiction over the state claim, and makes no ruling on the merits of that issue. The judgment entered January 13, 1976 is otherwise unaltered.

IT IS SO ORDERED.

Dated: March 15, 1976.

/s/ NOEL P. FOX

Chief U. S. District Judge

JUL 15 1976

MICHAEL RODAK, JR. CLERK

IN THE
Supreme Court of the United States

October Term, 1975

No. 75-478

PARKER SEAL COMPANY,

Petitioner,

v.

PAUL CUMMINS,

Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Sixth Circuit

**BRIEF OF SYNAGOGUE COUNCIL OF AMERICA
AND NATIONAL JEWISH COMMUNITY
RELATIONS ADVISORY COUNCIL,
*AMICI CURIAE****

LEO PFEFFER
15 East 84th Street
New York, New York 10028
(212) 879-4500

Attorney for Amici Curiae

* Constituent organizations listed on inside cover.

Constituent Organizations of Synagogue Council of America:	
CENTRAL CONFERENCE OF AMERICAN RABBIS, representing the Reform rabbinate;	
RABBINICAL ASSEMBLY OF AMERICA, representing the Conservative rabbinate;	
RABBINICAL COUNCIL OF AMERICA, representing the Orthodox rabbinate;	
UNION OF AMERICAN HEBREW CONGREGATIONS, representing the Reform congregations;	
UNION OF ORTHODOX JEWISH CONGREGATIONS OF AMERICA, representing the Orthodox congregations;	
UNITED SYNAGOGUE OF AMERICA, representing the Conservative congregations.	
Constituent Organizations of National Jewish Community Relations Council:	
AMERICAN JEWISH COMMITTEE;	
AMERICAN JEWISH CONGRESS;	
ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH	
JEWISH LABOR COMMITTEE;	
JEWISH WAR VETERANS OF THE UNITED STATES;	
NATIONAL COUNCIL OF JEWISH WOMEN, and one hundred local Jewish Community Councils, including all the major cities in the United States.	

TABLE OF CONTENTS

	PAGE
Interest of the <i>Amici</i>	3
Statutory Provisions and Regulations Involved	5
The Question to Which This Brief Is Addressed	6
Summary of Argument	6
Argument	
Point One—The challenged statute and guideline do not violate the Establishment Clause	7
A. The statute and guideline have a substan- tial secular purpose	7
B. The primary effect of the 1972 amendment and the 1967 guideline is not to advance re- ligion but to protect the religious freedom of those who observe a day other than Sun- day as their holy day of rest	11
C. The challenged statute and guideline do not foster divisive entanglement of govern- mental and religious activity	15
D. Consistent governmental practice, federal, state and municipal, supports the consti- tutionality of the challenged statute	18
Point Two—The challenged statute and guideline are necessary and proper measures for the en- forcement of the Free Exercise Clause of the First Amendment	21
Conclusion	26

TABLE OF AUTHORITIES

	PAGE
Cases:	
Abington School District v. Schempp, 374 U.S. 203 (1963)	8
Board of Education v. Allan, 392 U.S. 236, 243 (1968)	8
Braunfeld v. Brown, 366 U.S. 599 (1961)	10
Committee for Public Education and Religious Liberty v. Nyquist, 413 U.S. 756, 773-74 (1973)	8
Cruz v. Beto, 406 U.S. 939 (1972)	16
Engel v. Vitale, 370 U.S. 421, 423, 430 (1962)	20
Epperson v. Arkansas, 393 U.S. 97 (1968)	8
Girouard v. United States, 328 U.S. 61 (1946)	10
Hardison v. T.W.A. Inc., 527 F.2d 33 (8th Cir. 1975) <i>petition for cert. pending</i> , 44 U.S.L.W. 3481 (2/24/76)	9
Hunt v. McNair, 413 U.S. 734, 741-742 (1973)	8
Jackson v. Veri Fresh Poultry, Inc., 304 F.Supp. 1276 (E.D. La. 1969)	9
Jenison, In re, 375 U.S. 14 (1963)	24
Jordan v. North Carolina National Bank, 399 F. Supp. 172, 179-80 (W.D.N.C. 1975)	25
Lemon v. Kurtzman, 403 U.S. 602, 612-613 (1971)	8
Lemon v. Sloan, 413 U.S. 825, 829-830 (1973)	8
Marsh v. Alabama, 326 U.S. 501 (1916)	22, 23
McColluch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819)	25
McGowan v. Maryland, 366 U.S. 420, 449 (1961)	8
Meek v. Pittenger, 421 U.S. 349, 358 (1975)	7

	PAGE
Reid v. Memphis Publishing Co., 468 F.2d 348 (6th Cir. 1972) <i>aff'd after remand</i> , 521 F.2d 512 (1975)	9
Riley v. Bendix Corp., 464 F.2d 1113 (5th Cir. 1972)	9
Sherbert v. Verner, 374 U.S. 399 (1963)	24
Tilton v. Richardson, 403 U.S. 672, 678-79 (1971)	8
United States v. Ballard, 322 U.S. 78 (1944)	16
United States v. Kahane, 396 F. Supp. 687 (E.D.N.Y. 1975), <i>aff'd</i> 527 F.2d 492 (2d Cir. 1975)	16
Walz v. Tax Commission of the City of New York, 397 U.S. 664, 672-73 (1970)	8, 18
Wisconsin v. Yoder, 406 U.S. 205 (1972)	16, 24
Zorach v. Clauson, 343 U.S. 306, 313 (1952)	8, 11
Statutes:	
Civil Rights Act of 1964, Section 701(j), 42 U.S.C. §2000e(j)	5, 6, 21
Civil Rights Act of 1964, Section 703(a), 42 U.S.C. §2000e-2(a)	5, 21
Conn. Gen. Stat. §5-250(c)	18
Equal Employment Opportunity Commission Guideline 1605.1 (29 C.F.R. §1605.1)	5, 20
Fla. Stat. Ann. §231.40(1)(c)	18
N.J. Rev. Stat. 11:14-8	18
N.J. Stat. Ann. §18.14-92.2	20
N.Y. Civ. Serv. Rules and Regs. §21.6	18
N.Y. Educ. Law §3210(1)(6)	20
Universal Military Training and Service Act, Section 6(j), 50 U.S.C. App. 456(j)	16
42 U.S.C. §300a-7	13

PAGE

Miscellaneous:

118 Cong. Rec. H. 1861-62	10
D. Manwaring, F. G. Folsom, "Recent Restrictions Upon Religious Liberty," <i>American Political Sci- ence Review</i> , XXXVI, December 1942, p. 1053	17
D. Manwaring, <i>Render Unto Caesar; The Flag Salute Controversy</i> (1962) Ch. 8	17
Pfeffer, <i>The Supremacy of Free Exercise</i> , 61 George- town L. Rev. 1115 (1973)	24

IN THE

Supreme Court of the United States

October Term, 1975

No. 75-478

PARKER SEAL COMPANY,*Petitioner,**v.*

PAUL CUMMINS,

Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Sixth Circuit

**BRIEF OF SYNAGOGUE COUNCIL OF AMERICA
AND NATIONAL JEWISH COMMUNITY
RELATIONS ADVISORY COUNCIL,
AMICI CURIAE**

This brief *amici curiae* is submitted with the consent of the parties.

This proceeding was initiated by respondent Cummins after he was discharged by petitioner Parker Seal Company because he refused to work on Saturday. Respondent is a member of a seventh-day sect, the World Wide Church of

God. After he was discharged, he filed a charge of unlawful discrimination with the Federal Equal Employment Opportunity Commission (EEOC) which administers the federal fair employment law embodied in Title VII of the Civil Rights Act of 1964 (42 U.S.C. Sections 2000e *et seq.*). He also filed a charge with the Kentucky Human Rights Commission alleging violation of that state's fair employment law.

The Kentucky Commission dismissed respondent's charge after a hearing. The EEOC nevertheless issued a right-to-sue letter and respondent accordingly initiated this suit under the federal statute in the United States District Court for the Eastern District of Kentucky. That court, relying on the record before the Kentucky Commission, dismissed respondent's complaint. It found that petitioner had made a reasonable accommodation to respondent's religious needs.

The Court of Appeals for the Sixth Circuit reversed, with one judge dissenting. It held that: (1) the Kentucky Commission's order did not have *res judicata* effect; (2) there was no substantial evidence to support the conclusion that accommodation of respondent's religious practice would have imposed an undue hardship on the employer; and (3) the statutory provisions regarding religious practices did not violate the Establishment Clause, either by requiring employers to foster religion by deferring to their employees' religious requirements or by affording religious employees preferential treatment not accorded to others.

This Court issued its writ of certiorari to review the Court of Appeals' decision.

Interest of the *Amici*

This brief is submitted on behalf of the Synagogue Council of America and the National Jewish Community Relations Advisory Council.

The Synagogue Council of America is a co-ordinating body consisting of the organizations representing the three divisions of Jewish religious life: Orthodox, Conservative and Reform. It is composed of:

- Central Conference of American Rabbis, representing the Reform rabbinate;
- Rabbinical Assembly of America, representing the Conservative rabbinate;
- Rabbinical Council of America, representing the Orthodox rabbinate;
- Union of American Hebrew Congregations, representing the Reform congregations;
- Union of Orthodox Jewish Congregations of America, representing the Orthodox congregations;
- United Synagogue of America, representing the Conservative congregations.

The National Jewish Community Relations Advisory Council is a co-ordinating body comprised of the following national lay Jewish organizations, in addition to the congregational bodies mentioned above, concerned with American Jewish community relations:

- American Jewish Committee
- American Jewish Congress

Anti-Defamation League of B'nai B'rith
Jewish Labor Committee

Jewish War Veterans of the United States

National Council of Jewish Women

and one hundred local Jewish Community Councils, including all the major cities in the United States.

The organizations affiliated with the Synagogue Council of America and the National Jewish Community Relations Advisory Council include in their membership the overwhelming majority of Americans affiliated with Jewish organizations. We believe, therefore, that in submitting this brief we speak for the greater part of American Jewry.

Our interest in the cases before this Court is twofold. In the first place, the appellees, like members of the Jewish faith, observe the seventh day of the week as their Sabbath and refrain from all secular business and labor on that day. Enforcement of compulsory Sunday observance laws against them constitutes, in our view, a serious infringement of the civil, religious and economic rights of Jews and imposes a heavy burden upon them because of their adherence to their religious beliefs.

However, our concern extends beyond the interests of the particular parties to this litigation. We would be concerned even if the appellees were not observers of the seventh day of the week as the Sabbath. We believe that the principle of religious liberty is impaired if any person is penalized for adhering to his religious beliefs, or for not adhering to any religious belief, so long as he neither inter-

feres with the rights of others nor endangers the public peace or security.

For these reasons we sought and obtained the consent of counsel for the parties to submit this brief *amici curiae*.

Statutory Provisions and Regulations Involved

Section 703(a) of the Civil Rights Act of 1964 (42 U.S.C. Section 2000e-2(a) provides:

It shall be an unlawful employment practice for an employer—(1) to . . . discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . religion. . . .

Acting under this provision, the EEOC, in 1967, adopted Guidline 1605.1 (29 C.F.R. Section 1605.1), which provides:

[S]ection 703(a)(1) of the Civil Rights Act of 1964 . . . includes an obligation on the part of the employer to make reasonable accommodations to the religious needs of employees and prospective employees where such accommodations can be made without undue hardship on the conduct of the employer's business.

[T]he employer has the burden of proving that an undue hardship renders the required accommodations to the religious needs of the employee unreasonable.

In 1972, Title VII of the 1964 Civil Rights Act was amended by adding the following language as Section 701(j) (U.S.C. Section 2000e(j)):

The term "religion" includes all aspects of religious observance and practice, as well as belief, unless

an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

The Question to Which This Brief Is Addressed

This brief is addressed to the question of the constitutionality, under the First Amendment, of Section 701(j) of the Civil Rights Act of 1964 (and a regulation that preceded it), which defines "religion," as used in the section of that Act forbidding discrimination in employment because of religion, to include "all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's religious observance or practice without undue hardship on the conduct of the employer's business."

Summary of Argument

I. The challenged statute and guideline do not violate the Establishment Clause of the First Amendment since they have a clearly recognizable secular purpose, their primary effect is neither to advance nor inhibit religion, and neither the statute and guideline nor their administration involve excessive government entanglement with religion. By statute and practice, the Federal government and many state and municipal governments have long done and now do exactly what the challenged measures mandate and it is inconceivable that during this period they all have been violating the Establishment Clause.

II. Not only do the challenged statute and guideline not violate the Establishment Clause but their validity can be sustained under the "necessary and proper" clause of Article I, Section 18, of the Constitution, as applied to the Free Exercise Clause of the First Amendment.

ARGUMENT

POINT ONE

The challenged statute and guideline do not violate the Establishment Clause.

In *Meek v. Pittenger*, 421 U. S. 349, 358 (1975), this Court expressed the three-part test for validity of a statute challenged under the Establishment Clause. "First," it said, "the statute must have a secular legislative purpose. Second, it must have a primary effect that neither advances nor inhibits religion. Third, the statute and its administration must avoid excessive governmental entanglement with religion." Petitioners claim that the statute and regulation challenged herein fail under each of these tests. We believe there is no validity to this claim in respect to any part of the three-pronged test.

A. The statute and guideline have a substantial secular purpose.

In respect to the first of these prongs, we note that this Court has never found any statute enacted by Congress to be lacking a substantial secular purpose and only twice has it made such a finding in a challenge to a state statute. The claim of illegitimacy of purpose has been made often

but, with the two exceptions, it has consistently been rejected. *McGowan v. Maryland*, 366 U. S. 420, 449 (1961) (Sunday closing law); *Tilton v. Richardson*, 403 U. S. 672, 678-79 (1971) (inclusion of church-related colleges under the Higher Education Facilities Act of 1963); *Board of Education v. Allen*, 392 U. S. 236, 243 (1968) (aid to parochial schools); *Lemon v. Kurtzman*, 403 U. S. 602, 612-13 (1971) (same); *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U. S. 756, 773-74 (1973) (same); *Lemon v. Sloan*, 413 U. S. 825, 829-30 (same); *Hunt v. McNair*, 413 U. S. 734, 741-42 (1973) (aid to church-related colleges); *Walz v. Tax Commission of the City of New York*, 397 U. S. 664, 672-73 (1970) (tax exemption for houses of worship).

The two exceptions are *Abington School District v. Schempp*, 374 U. S. 203 (1963) (law requiring Bible reading in public schools), and *Epperson v. Arkansas*, 393 U. S. 97 (1968) (law banning teaching of evolution in public schools). Both of these cases involved affirmative religious intrusions into the public schools. Neither involved excusing children from school attendance on their Sabbath or holy days. That the Court has not questioned the constitutionality of such excusals is strongly suggested by *Zorach v. Clauson*, 343 U. S. 306, 313 (1952), which is far more apposite to the present case than *Abington* and *Epperson*.

With all due respect, the claim that the challenged statute lacks a secular legislative purpose borders on the frivolous. The logic of the claim is that any statute or constitutional claim seeking to protect the free exercise of religion, including the Free Exercise Clause of the First Amendment, lacks a secular purpose.

The only evidence submitted by petitioner to support this claim are remarks made in 1972 by Senator Randolph in sponsoring the amendment to the 1964 Act that became Section 701(j). The remarks quoted in the petitioner's brief (pp. 21-23), hardly support the claim and they are at least equally understandable as support of an amendment seeking to protect the religious liberty of those observing a day other than Sunday as their holy day of rest.

But there is a more serious flaw in petitioner's argument. As petitioner recognizes in its brief (pp. 17-18), respondent's claim arose before the 1972 amendment was adopted and accordingly was governed by the law at the time he was discharged. Hence, petitioner argues, as indeed it must, that the 1967 guideline upon which respondent's claim was initially based was itself lacking a secular purpose. The 1972 amendment is practically a verbatim incorporation of the relevant 1967 guideline. The Federal District Courts and Courts of Appeal passing upon claims under the guideline identical with that of the respondent herein had no difficulty regarding its constitutionality. *Jackson v. Veri Fresh Poultry, Inc.*, 304 F. Supp. 1276 (E.D. La. 1969); *Riley v. Bendix Corp.*, 464 F. 2d 1113 (5th Cir. 1972); *Reid v. Memphis Publishing Co.*, 468 F. 2d 346 (6th Cir. 1972), *aff'd after remand*, 521 F. 2d 512 (1975). *Accord, Hardison v. T.W.A. Inc.*, 527 F. 2d 33 (8th Cir. 1975), petition for cert. pending, 44 U.S.L.W. 3481 (2/24/76).

Petitioner herein recognizes this and explains the amendment as only an effort to remove some doubts as to whether the 1967 guideline was authorized by Title VII as it then read (Brief, p. 17). If this is so, and we have no doubt

that it is, Senator Randolph's remarks in 1972 are clearly irrelevant.

The purpose of the 1972 amendment is quite obvious—and plainly secular. It was not to change existing law but to codify it. Its specific purpose was, as petitioner notes, to remove the doubts as to EEOC's statutory authority to issue the very guideline upon which respondent herein based his claim in the first instance. See 118 Cong. Rec. H. 1861-62.

An analogous situation was the enactment by Congress in 1952 of a provision in the Immigration and Nationality Act codifying the decision of this Court in *Girouard v. United States*, 328 U. S. 61 (1946), which had held that the existing law did not bar naturalization of religious pacifists. The only difference between the two situations is that, in the present case, Congress sought to codify a number of consistent District Court and Court of Appeals decisions rather than a single decision of this Court. We suggest that this difference hardly supports a claim that the purpose of the 1972 amendment was purely sectarian.

Finally, we submit that petitioner's reliance on the "Sunday closing" cases (Brief, pp. 27-28) is likewise unsound. Petitioner particularly relies on *Braunfeld v. Brown*, 366 U. S. 599 (1961), in support of its position. However, in the plurality opinion in that case, Chief Justice Warren noted that a number of states provide by statute for an exemption for Sabbatarians "and this may well be the wisest solution to the problem" (at p. 608). Here, Congress has done exactly that. Petitioner's claim that it may not constitutionally do so is plainly inconsistent with Chief Justice Warren's opinion.

B. The primary effect of the 1972 amendment and the 1967 guideline is not to advance religion but to protect the religious freedom of those who observe a day other than Sunday as their holy day of rest.

The immediate obvious effect of the challenged statute and guideline, we submit, is not to advance religion but to relieve to some extent (*i.e.*, where the relief would be reasonable and would not impose undue hardship on the employer) the economic burden borne by a minority of Americans by reason of their faithful adherence to religions which do not conform to the majority's belief as to which day of the week God commanded abstention from labor. (As we seek to show below, the relief actually extends to a much broader class.) Of course, of those relieved by the statute and guideline from being required to go to work on Saturdays, some may attend church or synagogue on that day where otherwise they would be at work. But this, we suggest, is a slim reed to support a contention that this Court should nullify an act of the Congress, particularly one which does no more than codify existing practices of the Executive Department.

In *Zorach v. Clausen*, 343 U.S. 306 (1952), this Court upheld the constitutionality under the Establishment Clause of a law permitting the release of public school pupils if and only if they used the released period to participate in religious instruction. That law advanced religion far more than one that simply excused children from attending public schools on their days of religious observance, which would be the equivalent of the law and guideline challenged in the present suit. Nevertheless, the Court upheld the constitutionality of that law on the ground that its substantial

purpose and effect were not to advance religion but to accommodate the school attendance law to the religious needs of the children and their parents.

(Parenthetically we note that petitioner's concern that "churches holding services on Saturdays may enjoy a somewhat larger attendance with a correspondingly fuller collection plate" (Brief, p. 29) is hardly relevant in respect to the Orthodox and many Conservative Jews for whom we speak, since the same Mosaic law which forbids them to work on Saturdays also forbids them to carry or handle money on that day.)

Petitioner asserts that the challenged provisions "effect favoritism among the sects" and "impose on employers the views of those who observe the Sabbath on Saturdays, or who otherwise believe that their religious views mandate deference by others" (Brief, p. 30). There are many things wrong with that argument. In the first place, the statutory coverage is not limited to those who observe the Sabbath on Saturday. The statute does not even mention Saturday. It applies equally to Moslems, whose Sabbath is Friday and to those sects or even individuals who genuinely believe that Monday or Tuesday or any other day of the week is the divinely commanded day of rest. Indeed, perhaps most important, it applies to Sunday-observing Christians employed by a Sabbatarian in a state which does not have a Sunday closing law, or in any of the many industries and other enterprises that are permitted to operate seven days a week.

In the second place, because most states do have Sunday closing laws or do close on Sundays because of collec-

tive bargaining factors, the owner's personal religious predilections, or similar reasons, the primary effect of the statute is not to advance the religion of Saturday-observers but is rather to equalize or, more accurately, to diminish to some extent the inequality between adherents of the majority religion and those of minority faiths.

Finally, the statute is not limited to abstention from work on a Sabbath, whether it be Saturday, Sunday or any other day of the week. It applies equally, for example, to Catholic and many non-Catholic physicians, nurses and other hospital employees who for religious reasons refuse to participate in an abortion procedure, to hospital employees who as members of the Jehovah's Witness sect refuse for religious reasons to participate in a blood transfusion procedure, and to sales clerks in pharmacies who have religious scruples against selling contraceptives. Without expressing an opinion one way or the other on whether these persons should be protected from dismissal (*cf.* 42 U.S.C. §300a-7, which gives certain protections to persons having religious scruples concerning sterilization and abortion), we submit that their obvious inclusion in the challenged statute and guideline negates the contention that their purpose and/or primary effect is to advance the religion of those who, like respondent herein, observe a day other than Sunday as their divinely ordained day of rest.

On page 33 of its brief, petitioner asserts that the "very narrowness of the class benefited by the accommodation provisions underscores that the primary impact is forbidden religious advancement." But, as we have shown, the class benefited is not narrow at all; it extends to all whose

religious convictions impel some accommodation on the part of the employer. It benefits, for example, the conventional Sunday-observing Christian who happens to be employed by a Sabbatarian or by an employer who keeps his business open seven days a week. It benefits the Catholic or member of any other faith that forbids participation in abortions, the store clerk who will not sell contraceptives, the Jehovah's Witness who will not salute the flag or pledge allegiance to it or cooperate in a blood transfusion and the Quaker civil service employee in a state which imposes an oath of office but does not permit an affirmation in lieu thereof. In all these instances and others that could be cited, the statute and guideline benefit not a narrow class but a class which in one instance or another may encompass a majority of Americans.

Moreover, even if the purpose of the challenged statute were to benefit a narrow class, that would hardly require its invalidation. The very purpose of the Establishment Clause, and of the Free Exercise Clause as we will shortly indicate, is to benefit "narrow" classes. No First Amendment is needed to protect members of large, conventional religions.

Finally, we submit that petitioner is in error in relying on this Court's decisions forbidding governmental financial aid to religious schools (Brief, pp. 32-33). Those decisions forbid the state to pay for educational services which it may itself not constitutionally furnish. The statute challenged here makes no such demand. It does not compel the employer to pay for services which, by reason of his religious convictions, the employee may not furnish or which, because of the First Amendment, the employer may not accept. If

a Sabbatarian performs only four days' service weekly, the statute does not compel the employer to pay him for five. And, if the employee's absence from work on his Sabbath causes undue hardship on the conduct of the employer's business, the employer may lawfully discharge him. The religious school aid decisions forbid government to finance the operation of religious educational institutions. No religious institution, educational or otherwise, is financed directly or indirectly by the operation of the statute and guideline challenged herein.

C. The challenged statute and guideline do not foster divisive entanglement of governmental and religious activity.

In support of its claim that the challenged statute fosters divisive entanglement of government in religious matters, petitioner quotes from the dissenting opinion in the court below that "[d]isposition of complaints under the [1972] amendment will require inquiry into the sincerity with which beliefs are held and force consideration of the validity of the religious nature of the claims . . ." (Brief, p. 35). We are not certain what is meant by the phrase "the validity of the religious nature of the claim," but we assume that it means no more than that the claim is motivated by religious rather than nonreligious factors, and not that the employee's claimed religion does in fact impel him not to work on Saturdays. If we are correct in our assumption, it is simply another way of saying that the belief contemplated by the 1972 amendment must be sincerely held. The necessity imposed on government to make this inquiry and reach a determination thereon, petitioner asserts, will result in excessive government entanglement with religion.

Acceptance of this contention, we submit, would make an absurdity of the Free Exercise Clause, for it would mandate acceptance of any claim, no matter how frivolous, or rejection of all claims, no matter how sincere, made thereunder. More than 30 years ago, this Court held in *United States v. Ballard*, 322 U.S. 78 (1944), that it is constitutional to allow a jury, in a prosecution for obtaining property under false pretenses relating to religion, to decide whether the defendants believed in the truth of the representations they made. In many thousands of cases, Selective Service boards have been required under Section 6(j) of the Universal Military Training and Service Act, 50 U.S.C. App. 456(j), to pass on the sincerity of claims to a "belief in a relation to a Supreme Being involving duties superior to those arising from any human relation." In *Wisconsin v. Yoder*, 406 U.S. 205 (1972), this Court upheld the right of parents under the Free Exercise Clause to withhold their children from attendance at secondary schools if they believed that their religious conscience would be violated by allowing them to attend. In *Cruz v. Beto*, 406 U.S. 939 (1972), this Court held that the Free Exercise Clause protected a prisoner's right to participate in religious services. See also *United States v. Kahane*, 396 F. Supp. 687 (E.D.N.Y. 1975), *aff'd*, 527 F. 2d 492 (prisoner's right to nutritionally adequate food which is compatible with religious dietary restrictions).

In all of these situations, acceptance of the constitutional claim depends on a judgment as to the sincerity of the asserted religious belief.

On p. 37 of its brief, petitioner notes that the exemption from Saturday service enjoyed by respondent caused resentment on the part of his fellow-workers. Any such resent-

ment can hardly be compared to the resentment expressed by millions of draftees (and their parents) who could not validly claim religious exemption and were therefore required to serve. The arousal of resentment by religious minorities asserting their constitutional or statutory rights is by no means unusual. The sad history of the reaction to the refusal of Jehovah's Witnesses to allow their children to salute the flag in public school exercises testifies to that. See D. Manwaring and F. G. Folsom, "Recent Restrictions Upon Religious Liberty," *American Political Science Review*, XXXVI, December 1942, p. 1053; D. Manwaring, *Render Unto Caesar: The Flag-Salute Controversy* (1962), Chapter 8. This, however, is the price which must be paid for the preservation of religious freedom, a price which our history establishes the people have been willing to pay.

Whenever a governmental body is required to pass on a religion-based claim, some entanglement with religion is unavoidable. Were that entanglement fatal, no law exempting religious institutions from taxation would be constitutional. All religious incorporation laws would be invalid. Laws forbidding the sale of alcoholic beverages within specified distances of houses of worship would be unconstitutional, for in each case the governmental body mandated to enforce the law would be forbidden to determine whether the claimant for protection was truly a house of worship. Laws exempting Christian Scientist and other practitioners of faith healing from laws regulating medical practice could not stand. Public school children could not be released for religious instruction since the school authorities could not determine whether the instruction was truly religious. Military chaplaincies could be outlawed, for the military authorities would be barred from passing judgment

on whether the applicant was truly a chaplain and, if so, whether he was a competent one. Ministers could not be exempt from military or jury service. "Church Entrance—No Parking" signs would have to be removed. And innumerable other instances of legal determinations of claims based upon religion would have to be discontinued.

It is for this reason that the third prong of the test upon which petitioner relies mandates only *excessive* government entanglement with religion. A statute which seeks to forbid discrimination in employment because of religion necessarily imposes upon governmental agencies, whether judicial or administrative, the obligation to determine whether a claim asserted thereunder is valid and a review of the claim for that purpose can hardly be held to entail forbidden excessive entanglement.

D. Consistent governmental practice, federal, state and municipal, supports the constitutionality of the challenged statute.

In *Walz v. Tax Commission*, 397 U.S. 664 (1970), this Court held that the practical universality of tax exemption for religious institutions is strong evidence of its constitutionality. While the practice of arranging the working schedule of governmental employees who are Sabbatarians so as not to compel them to violate their religious obligations may not be quite as universal as tax exemption for churches, it is sufficiently widespread so as to present strong evidence that it is constitutional. See, e.g., Conn. Gen. Stat. §5-250(c); Fla. Stat. Ann. §231.40 (1)(c); N.J. Rev. Stat. 11:14-8; N.Y. Civ. Serv. Rules and Regs. §21.6. Generally, only where the employee's seven-

day availability for service is critically important to the performance of his duties—the functional equivalent of "undue hardship on the conduct of the employer's business" in the statute challenged herein—is a Sabbatarian compelled to choose between the loss of his position or the violation of his religious obligation.

Government, under our system, must act in accordance with law, and the Constitution is the supreme law of the land. If it is a violation of the Establishment Clause for the government to require other employers to make reasonable accommodations so as not to compel their employees to violate their religious obligations by working on their holy day of rest, it is no less a violation if the government, as employer itself, makes such accommodations.

It is no answer that the accommodation made by the government does not injure anyone whereas, if it is made by a private employer, he and/or the Sabbatarian's fellow employees may be injured by it. Under the statutory provision challenged herein, the Sabbatarian employee is not entitled to relief if accommodation would be unreasonable or would cause undue hardship on the conduct of the employer's business. Conversely, it can hardly be urged that the exemption from military service enjoyed by clergymen and religious objectors to military service does not injure draftees who otherwise would not have been called to service.

Nor is it a sufficient answer that the government acts voluntarily whereas the private employer acts under compulsion of statutory law. In the first place, it is doubtful that, in our political system, any action of government can

be said to be voluntary and not under compulsion of law. Secondly, whatever the case may be under the Free Exercise Clause, the voluntariness of the challenged action is irrelevant in judging whether it is violative of the Establishment Clause. See *Engel v. Vitale*, 370 U.S. 421, 423, 430 (1962), where it was held that neither the fact that introduction of prayer recitation in public schools was voluntary on the part of a school board nor the fact that participation by the pupils was likewise voluntary immunized the practice from successful challenge under the Establishment Clause. Finally, in many cases the government, federal, state or municipal, does act in compliance with statutory law, as when it accords exemption from military service to religious pacifists, or provides for absentee voting when a primary or election day falls on a religious holiday, or exempts from the sanctions of the compulsory school attendance law those children whose absence is dictated by the fact that a particular school day falls on a holiday sacred to them. See, *e.g.*, N.J. Stat. Ann. §§18.14-92.2; N.Y. Educ. Law §3210(1)(6).

Concluding this part of our brief, we urge that there is no validity to the claim that either Section 701(j) of the Civil Rights Act of 1964 or Guideline 1605.1 of the United States Equal Employment Opportunity Commission which preceded it, violates the Establishment Clause of the First Amendment to the Constitution.

POINT TWO

The challenged statute and guideline are necessary and proper measures for the enforcement of the Free Exercise Clause of the First Amendment.

The First Amendment bars not only laws respecting an establishment of religion but also measures that prohibit its free exercise. While we do not have in this case a statute or other formal governmental regulation forbidding an employer from making a reasonable accommodation to an employee's religious observance or practice, we believe that enactment of the statute challenged here was within the power of Congress, under the Necessary and Proper Clause of Article I, Section 8 of the Constitution, to carry out the provisions of the Free Exercise Clause of the First Amendment.

Preliminarily, it should be noted that, as petitioner concedes, Congress had clear power, under the Commerce Clause, to enact that part of the 1964 Civil Rights Act (Section 703(a)(1)) which forbids discriminatory employment practices on the basis of religion. The power of Congress under the Commerce Clause to enact Section 701(j), we submit, is equally clear.¹ Petitioner is in effect arguing here that this Court must restrict Congress' powers under the Commerce Clause in order to prevent an impairment of the Religion Clause. We suggest that, on the contrary, this Court may and should uphold the statute as a

1. We do not, of course, suggest that, if Section 701(j) violates the Establishment Clause, it may nevertheless be upheld under the Commerce Clause. We believe we have shown, in Point One above, that it does not.

proper and consistent exercise of Congressional powers under both clauses. Such a result would be consistent with the principle that the courts should read constitutional commands in a way that makes them consistent with each other rather than in a way that would require the sacrifice of one in order to carry out the other.

The power of Congress to act affirmatively to protect freedom of religion was strongly suggested by this Court in *Marsh v. Alabama*, 326 U.S. 501 (1946). The Court there held that, under the Free Exercise Clause, a company wholly owning a town could not bar colporteurs from distributing religious tracts on its streets. In reaching that result, the Court specifically suggested (although Justice Frankfurter expressed the view (at p. 511) that it was not necessary to do so) that the same result could have been reached by Congressional action under the Free Exercise Clause. It said (p. 507, n.4):

And certainly the corporation can no more deprive people of freedom of press and religion than it can discriminate against commerce. In his dissenting opinion in *Jones v. Opelika*, 316 U.S. 584, 600, . . . which later was adopted as the opinion of the Court, 319 U.S. 103, 194, . . . Mr. Chief Justice Stone made the following pertinent statement: "Freedom of press and religion, explicitly guaranteed by the Constitution, must at least be entitled to the same freedom from burdensome taxation which it has been thought that the more general phraseology of the commerce clause has extended to interstate commerce. Whatever doubts may be entertained as to this Court's function to relieve, *unaided by Congressional legislation*, from burdensome taxation under the commerce clause, . . . it cannot be thought that that function is wanting under

the explicit guaranties of freedom of speech, press and religion." (citations omitted; emphasis added.)

The power of Congress to protect interstate commerce from interference, by burdensome taxation or otherwise, extends to interference by private enterprises like petitioner as well as to interference by states. In the present case, Congress has enacted legislation of the kind suggested in *Marsh*. What we are here suggesting is that that action can be viewed as an exercise of Congressional powers under both the Commerce and Free Exercise Clauses.

We do not urge, nor is it necessary for this Court to decide, that, if Section 703(a)(1), the EEOC Guidelines and the 1972 amendment had not been adopted, an employer would nevertheless be prohibited from barring Sabbatarians from employment by virtue of the Free Exercise Clause alone. We submit only that the Necessary and Proper Clause, invoked under the Free Exercise Clause, empowers Congress and the EEOC to adopt the statute and regulations that are challenged here. Just as this Court found in *Marsh* that the predominant position of the company in the town required invoking the protections of the Free Exercise Clause, Congress could properly find that the power of employers operating in interstate commerce to exclude Sabbatarians from employment constituted such a threat to their religious freedom as to require Congressional action, applicable to all such employers alike, preventing such an exclusion. In this respect, the 1972 amendment stands on the same footing as the basic provision in the 1964 Act prohibiting discrimination based on religion. That provision also finds support in the power of Congress

to protect the free exercise of religion,² just as the prohibition of racial discrimination finds support in the power of Congress to implement the Fourteenth Amendment.

The trend of this Court's decisions in recent years has been toward broad interpretation and application of the Free Exercise Clause.³ Thus, in *Sherbert v. Verner*, 374 U.S. 399 (1963), this Court held that a denial of unemployment compensation benefits to a worker who, like respondent herein, could not conscientiously accept employment that required her to work on Saturday, violated the Free Exercise Clause. In the case of *In re Jenison*, 375 U.S. 14 (1963), this Court held that a woman whose religious conscience forbade her from serving on juries because it would violate the Biblical command, "Judge not that ye be not judged," could not, consistent with the Free Exercise Clause, be held in contempt of court. And in *Wisconsin v. Yoder*, 406 U.S. 205 (1972), this Court held that the Free Exercise Clause forbade prosecution under a state's compulsory school attendance law of Amish parents whose religious conscience would not allow them to send their children to secondary schools.

We submit that equal liberality in the interpretation of the First Amendment is called for when this Court is passing on the validity of a Congressional enactment which has both the intent and effect of protecting the free exercise

2. Although petitioner argues at page 38 of its Brief that Title VII was not designed "to implement the Bill of Rights," it states at an earlier point (page 15) that "the free exercise interests of employees . . . are already served by the original proscription in Title VII of religious discrimination in private employment."

3. For a fuller development of this point, we respectfully refer the Court to Pfeffer, *The Supremacy of Free Exercise*, 61 Georgetown Law Rev. 1115 (1973).

of religion. In such a case, the classic words of John Marshall in *McCulluch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819), are particularly appropriate:

. . . Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adopted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional.

The conclusion we urge here was reached in *Jordan v. North Carolina National Bank*, 399 F. Supp. 172, 179-80 (W.D.N.C. 1975), a well-reasoned decision which we commend to the Court's attention. In the last paragraph of that part of the District Court's opinion which deals with the Free Exercise claim, the Court said:

Congress, as evidenced by the debates relating to the 1972 Amendments to Title VII felt §2000e(j) furthered First Amendment freedoms. Senator Harrison Williams in discussing §2000e(j) quoted the pertinent portion of the First Amendment and stated "In dealing with the free exercise thereof, really, this [*i.e.*, §2000e(j)] promotes the constitutional demand in that regard." "Legislative History of the Equal Employment Opportunity Act of 1972", p. 715.

Conclusion

It is respectfully submitted that, for the reasons stated above, this Court should affirm the ruling of the court below upholding the constitutionality of §701(j) of the Civil Rights Act of 1964, as amended, and EEOC Guideline 1605.1.

Respectfully submitted,

LEO PFEFFER
15 East 84th Street
New York, New York 10028
(212) 879-4500

Attorney for Amici Curiae

July, 1976

JUL 13 1976

MICHAEL RODAK, JR. CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-742 75-4781

PARKER SEAL COMPANY, *Petitioner,*

v.

PAUL CUMMINS, *Respondent.*

On Writ of Certiorari to the United States Court of Appeals
for the Sixth Circuit

**BRIEF FOR THE SEVENTH-DAY ADVENTIST
CHURCH, AMICUS CURIAE**

WARREN L. JOHNS
WALTER E. CARSON
JOHNS & CARSON
6930 Carroll Avenue
Washington, D.C. 20012
(301/270-2552)
Attorneys for Amicus Curiae

PHILIP B. KURLAND
ALAN L. UNIKEL
ROTHSCHILD, BARRY & MYERS
Two First National Plaza
Chicago, Illinois 60603
(312/372-2345)
Of Counsel

July 13, 1976

IN THE
Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-748

PARKER SEAL COMPANY, *Petitioner,*

v.

PAUL CUMMINS, *Respondent.*

On Writ of Certiorari to the United States Court of Appeals
for the Sixth Circuit

**BRIEF FOR THE SEVENTH-DAY ADVENTIST
CHURCH, AMICUS CURIAE**

*To the Chief Justice of the United States and the
Associate Justices of the Supreme Court of the
United States:*

For the reasons herein stated, the Seventh-day Adventist Church, *amicus curiae*, respectfully submits that the judgment of the court below should be affirmed.

INTEREST OF THE AMICUS CURIAE

The *amicus curiae* is a religious denomination whose membership follows the command of the Bible that the Sabbath, the Seventh-day, be set aside from work

and other worldly endeavors.¹ The respondent here is a member of another denomination observing the Sabbath. The interest of the *amicus curiae* in the outcome of this case is obvious. The petitioner has challenged the validity of national laws and regulations that would require employers to accommodate the religious needs of employees, including those who observe the seventh day as holy. Adherents to the religious tenets of this denomination, as well as others who observe a day of rest because of their religious beliefs, will be directly affected by the judgment of the Court in this case.

Amicus curiae has secured the written consent of both parties to filing a brief herein (see Appendix). The letters of consent have been filed with the Office of the Clerk.

¹ The observance of the Sabbath for the *amicus* is by no means an arbitrary, mechanical, ritualistic practice. Rather, he sees a mandate for the Sabbath in the fourth of the Ten Commandments where it is portrayed as a specific weekly memorial to the creative power of God and as the believer's invitation to a particular and personal fellowship with God (Exodus 20:8-11). As suggested by Deuteronomy 5:12-15, the observance of the Sabbath is a symbol also of man's creation in the image of God with the dignity of free choice and freedom from servitude.

Amicus views the Sabbath as the day carefully observed by the man Christ Jesus and released by Him, as Lord of the Sabbath day, from the demeaning encrustations of human traditions (Luke 4:16; Matthew 12:1-13, Mark 2:27, 28). Also, as indicated in Hebrews 4, the Sabbath rest is both a symbol of the Christian's deliverance from the bondage of sin by the redemptive and creative power of Jesus Christ and of rest from his unavailing effort to earn salvation by the merit of his own works. More than a recommended religious practice, the observance of the Christian Sabbath is, for the *amicus*, a sign of the restored harmonious relationship between the believer and his Creator-Redeemer (Ezekiel 20:12).

ARGUMENT

Petitioner has raised two questions for resolution by this Court. The first is a question of law. Do §§ 701(j) and 703(a)(1), of the 1964 Civil Rights Act 42 U.S.C. §§ 2000e(j) and 2000e-2(a)(1), and Equal Employment Opportunity Commission (E.E.O.C.). Guideline 1605.1, 29 C.F.R. § 1605.1, violate the Establishment Clause of the First Amendment? It is this question that is of prime interest to *amicus*. We assert that this question should be answered in the negative: there is no constitutional violation.

The second question is a question of fact. Did petitioner carry its burden of persuasion that it could not reasonably accommodate its operations to permit its employee, the respondent, to fulfill his religious obligations? We assert that this question, too, should be answered in the negative. Petitioner has not carried its burden to show that it cannot reasonably comply with the requirements of the Civil Rights Act of 1964 and the E.E.O.C. Guidelines.

I. The Constitutional Question: the Statutory Command that Petitioner Not Discriminate Against Its Employees on Religious Grounds Is Clearly Justified by *Sherbert v. Verner*.

At the outset it should be noted that the constitutional question raised here is far broader than the application and validity of §§ 701(j) and 703(a)(1) of the Civil Rights Act of 1964 and the E.E.O.C. Guideline 1605.1. The constitutional justification for a statutory ban on religious discrimination in employment is the same as that for banning discrimination in employment on grounds of race, or sex, or ethnic background. Admittedly, neither the First Amendment nor the Fourteenth Amendment operates directly on nongovernmental entities in this regard. But both are sources of rules that the national legislature may impose on private in-

dividuals and entities. If there is no constitutional justification for banning discrimination, there is no such justification for banning discrimination by race, or sex, or ethnic origins. Thus, the basic issue raised by this petition is whether Title VII, as applied to nongovernmental entities, is a constitutional exercise of Congressional power.

The question, then, is whether Congress may impose on private employers at least the same interdiction against religious and racial and ethnic and sex discrimination that the Constitution itself imposes on the national and state governments. It has been decided that the legislative power may even prohibit discrimination that would not be banned by the Constitution if exercised by a governmental agency. Thus, the Court of Appeals for the Second Circuit, in *Communications Workers v. American T. & T. L.L. Dep't*, 513 F.2d 1024, 1031 (2d Cir. 1975), has said:

Under the Commerce Clause, Congress plainly has the power to prohibit by statute various forms of discrimination in private employment which it deems would adversely affect the flow of interstate commerce. *Heart of Atlanta Hotel v. United States*, 379 U.S. 241, 85 S.Ct. 348, 13 L.Ed.2d 258 (1964); *Katzenbach v. McClung*, 379 U.S. 294, 85 S.Ct. 377, 13 L.Ed.2d 290 (1964). [Ftnt. 12: "This is in addition to the Congressional power under Section 5 of the Fourteenth Amendment to enforce by appropriate legislation, the dictates of the Equal Protection Clause. . . ."]

Title VII is legislation of this nature, designed to prohibit a broad spectrum of discriminatory evils which Congress deemed would have such an adverse effect. There is no requirement that the discrimination practices forbidden by this statute should be limited to practices violative of the Equal

Protection Clause. Practices forbidden by Title VII and the EEOC guidelines issued thereunder may, nonetheless, be able to survive Equal Protection attack.

It is not necessary here, however, to decide whether the scope of the statutory ban may exceed the scope of the constitutional ban. For this Court has decided in *Sherbert v. Verner*, 374 U.S. 398 (1963), that the kind of accommodation demanded of the employer here was constitutionally compelled when the discriminating party was a State. In *Sherbert*, the State was prepared to provide unemployment compensation only for those who were available to work on Saturdays, and not for those who, for religious reasons, would not accept employment that required work on the Sabbath. The Court held that this was an invalid discrimination that threatened, without justification, the appellant's freedom of religion. In response to the question whether compelling such special treatment for a Sabbatarian would constitute an invasion of the Establishment Clause, the Court's answer was clear and unambiguous:

In holding as we do, plainly we are not fostering the "establishment" of the Seventh-day Adventist religion in South Carolina, for the extension of unemployment benefits to Sabbatarians in common with Sunday worshippers reflects nothing more than the governmental obligation of neutrality in the face of religious differences, and does not represent the involvement of religious with secular institutions which is the object of the Establishment Clause to forestall. See *School Dist. of Abington Township v. Schempp*, 374 U.S. 203. Nor does the recognition of the appellant's right to unemployment benefits under the state statute serve to abridge any other person's religious liberties. Nor

do we, by our decision today, declare the existence of a constitutional right to unemployment benefits on the part of all persons whose religious convictions are the cause of unemployment. This is not a case in which an employee's religious convictions serve to make him a nonproductive member of society . . . [374 U.S. at 409-10.]

This language is equally applicable, *pari passu*, to the facts of this case.

Thus, to hold that the legislative command in Title VII against religious discrimination violates the provisions of the First Amendment would be to turn that Amendment on its head. Its essential purpose, recognized throughout the Court's decisions, is to avoid unnecessary imposition, both by state and church, on religious minorities. Surely the Court can find no infringement of that command in a legislative mandate that private employers, too, avoid religious discrimination.

II. The Constitutional Issue: the Statute and Regulation in Issue Here Meet the Three-Pronged Test of *Lemon v. Kurtzman* and Its Progeny.

The three-pronged test on which petitioner would place such heavy reliance derives from *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). This test is met in each of its particulars by the statute and guideline in question here.

The purpose of the legislative act is totally secular. It seeks to avoid discrimination in employment on grounds that are irrelevant to the employment involved, whether they be prejudices grounded in race, sex, ethnic origin, or religion. The secular purpose of the legislation is admirably stated in the quotation from the *Communication Workers* case, set out above at pp. [4-5] of this brief.

The secular goal is nondiscrimination in employment. The statutory ban on discrimination, whether on religious, racial, sex, or ethnic grounds, is the means by which this secular goal is to be effected. And this Court, in *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975), and *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), has recognized and enforced this secular objective of nondiscrimination in terms that are equally applicable here.

Nor is there any invalid benefit conferred on any religious organization or group by the statute or guideline. At most it may be said that a hardship on an individual, that would otherwise be suffered because of his religious beliefs, will now be alleviated.

Thus, although there is no evidence whatsoever to support the proposition that the Sabbatarian churches will be the beneficiaries of the statute or regulation, it is clear from this Court's decisions that any incidental benefit from this requirement of religious nondiscrimination would not be a basis for invalidating the law. That is not only the clear lesson of *Sherbert v. Verner*, *supra*, but has clearly been the rule repeatedly announced by this Court since *Lemon v. Kurtzman*. See, e.g., *Roemer v. Board of Public Works* — U.S. —, 44 U.S. Law Week 4939 (21 June 1976); *Tilton v. Richardson*, 403 U.S. 671 (1971); *Walz v. Tax Commission*, 397 U.S. 644 (1970); *Zorach v. Clauson*, 343 U.S. 306 (1952); and *Everson v. Board of Education*, 330 U.S. 1 (1947). Wherever freedom of religion is protected by the First Amendment guarantees and laws in support of them, the churches will receive some incidental benefit from the fact that its members are allowed to act in accordance with their religious

commitments. See *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

As this Court only recently announced: "*Everson* and [*Board of Education v. Allen*], 392 U.S. 236 (1968)] put to rest any argument that the State may never act in such a way that has the incidental effect of facilitating religious activity." *Roemer v. Board of Public Works, supra*, at 4942. Petitioner seeks to assert a standard that was specifically rejected in the case that gave rise to the three-pronged test. "The objective is to prevent, as far as possible, the intrusion of either [church or state] into the precincts of the other." *Lemon v. Kurtzman, supra*, at 614. The Court went on to reject the concept of "total separation" for which petitioner contends:

Our prior holdings do not call for total separation between church and state; total separation is not possible in an absolute sense Judicial caveats against entanglement must recognize that the line of separation, far from being a "Wall," is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship. [*Id.* at 614.]

Obviously there is no undue entanglement between church and state in a law forbidding religious discrimination by compelling employers to "accommodate" in the same manner as the First Amendment compels the national and state governments to accommodate. There is no entanglement at all. As this Court put the question in *Meek v. Pittinger*, 421 U.S. 349, 372 (1975), the decision on which petitioner relies: "Given the nature of the aid and the nature of the recipient, how much surveillance of the religious institutions by the state is required?" The answer, here, as indicated is none.

III. The Factual Question: Could Petitioner Accommodate Respondent's Religious Needs "Without Undue Hardship on the Conduct of the Employer's Business"?

The question whether petitioner could accommodate to respondent's religious needs "without undue hardship on the conduct of the employer's business," (E.E.O.C. Guideline 1605.1, 29 C.F.R. § 1605.1) is obviously not a question of law but one of fact. The Court of Appeals ruled that the employer could so accommodate itself. It rested its conclusion on the fact that until the appointment of a new plant manager, the petitioner did indeed accommodate respondent's religious needs and that other means than those used were available to it to work out that accommodation. The essential argument for not continuing that accommodation, as set forth in petitioner's brief (p. 9), was: "The plant manager could not overlook the smoldering resentment among Cummins' fellow supervisors." The Court of Appeals found that to be an inadequate reason to justify discrimination. It is hard to gainsay the Court of Appeals findings:

In the case at bar, however, Appellee has shown no such dire effect upon the operation of the business. To the contrary, the complaints of Appellant's fellow supervisors seem both mild and infrequent. In addition, it appears that Appellee might have alleviated at least some of the dissension if it had pursued a more active course of accommodation. For example, Appellee's officials could have required Appellant to work longer hours on week days or on Sundays. They could have reduced Appellant's salary commensurately with his shorter work week. They could have taken pains to ensure that Appellant substituted for his colleagues on an equitable basis, rather than assuming that the coworkers would make

appropriate demands upon Appellant. [516 F.2d 550]

Certainly the record supports the conclusion of the Court of Appeals. Certainly there is no reason in this record for this Court to reject the conclusion. The burden here, as in *Duke Power* and *Albemarle, supra*, was on the employer to demonstrate good reason for its lack of accommodation. The record demonstrates that petitioner did not meet that burden.

CONCLUSION

There would be irony, indeed, if the provisions of the First Amendment were held, as petitioner demands, to compel religious discrimination rather than to prevent it, when prevention of religious discrimination is of the essence of the First Amendment. The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

WARREN L. JOHNS
WALTER E. CARSON
JOHNS & CARSON
6930 Carroll Avenue
Washington, D.C. 20012
(301/270-2552)
Attorneys for Amicus Curiae

PHILIP B. KURLAND
ALAN L. UNIKEL
ROTHSCHILD, BARRY & MYERS
Two First National Plaza
Chicago, Illinois 60603
(312/372-2345)
Of Counsel

July 13, 1976

APPENDIX

1a

APPENDIX

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-478

PARKER SEAL COMPANY, *Petitioner*

v.

PAUL CUMMINS, *Respondent*

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner's Consent to the Filing of an Amicus Curiae Brief

Now Comes Leonard H. Becker, Counsel for the Petitioner, Parker Seal Company, and pursuant to Rule 42 of the Rules of the Supreme Court of the United States, hereby Consents to the filing of an Amicus Curiae Brief by the Seventh-day Adventist Church on behalf of the Respondent, herein, Paul Cummins.

/s/ LEONARD H. BECKER
Leonard H. Becker
ARNOLD & PORTER
1229 Nineteenth Street, N.W.
Washington, D. C. 20036

DATED: May 26, 1976

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-478

PARKER SEAL COMPANY, *Petitioner*

v.

PAUL CUMMINS, *Respondent*

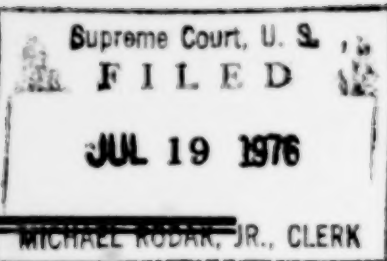
ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

Respondent's Consent to the Filing of an Amicus Curiae Brief

Now Comes Thomas L. Hogan, Counsel for the Respondent, Paul Cummins, and pursuant to Rule 42 of the Rules of the United States Supreme Court, hereby Consents to the filing of an Amicus Curiae Brief by the Seventh-day Adventist Church on behalf of said Respondent.

/s/ THOMAS L. HOGAN . .
Thomas L. Hogan
1288 Cherokee Road
Louisville, Kentucky 40204

DATED: 5/26/76



IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1975

No. 75-478

PARKER SEAL COMPANY,

Petitioner,

v.

PAUL CUMMINS,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF AMERICANS UNITED FOR SEPARATION OF CHURCH
AND STATE AS AMICUS CURIAE

JAMES W. RESPASS
8120 Fenton Street
Silver Spring, Md. 20910

Attorney for Amicus Curiae.

TABLE OF CONTENTS

	<i>Page</i>
INTEREST OF THE AMICUS CURIAE.....	1
STATUTE INVOLVED.....	2
THE QUESTIONS PRESENTED.....	2
STATEMENT OF THE CASE.....	3
SUMMARY OF ARGUMENT.....	4
ARGUMENT.....	4
CONCLUSION.....	15

TABLE OF AUTHORITIES

Cases

<i>Abington School District v Schempp</i> , 374 U.S. 203(1963)	5, 8
<i>Barrera v. Security Bldg. & Inv. Corp.</i> , 519 F.2d 1166 (C.A. Tex. 1975).....	10
<i>Board of Education v. Allen</i> , 332 U.S. 236 (1968).....	5
<i>Bradford v. Weinstein</i> , 519 F.2d 128 (C.A.N.C. 1974) cert. granted 95 S.Ct. 2394.	14
<i>Bradley v. School Board</i> , 416 U.S. 696 (1974).....	5
<i>Braunfield v. Brown</i> , 366 U.S. 599 (1961).....	5
<i>Carr v. St. John's University, New York</i> , 231 N.Y.W. 2d 403, 34 MISC. 2d 319 (1962) Reversed on other grounds 231 N.Y.S. 2d 410, 17 A.D. 2d 632, affirmed 235 N.Y.S. 2d 834, 12 N.Y. 2d 802.....	9

(ii)

Cases (cont.):

<i>Committee of Public Education v. Nyquist</i> , 413 U.S. 756 (1973).....	5
<i>Cronheim v. Loveman</i> , 142 So. 550.....	14
<i>DeSpain v. DeKalb County Community School Dist.</i> , 384 F.2d 836, cert. denied 390 U.S. 906, 88 S.Ct. 815, 19 L.Ed. 2d 873 (1968).....	9
<i>Douglas v. City of Jeanette, Pa.</i> , 319 U.S. 157, 63 S.Ct. 877, 87 L.Ed. 1324 (1943).....	9
<i>Earley v. DiCenso</i> , 403 U.S. 602, 91 S.Ct. 2105 29 L.Ed. 2d 745 (1971).....	10
<i>Everson v. Board of Education</i> , 330 U.S. 1.....	5
<i>Expert Elec., Inc. v. Levine</i> , 339 F.Supp. 893, D.C.N.Y. (1975).....	14
<i>Gillette v. United States</i> , 401 U.S. 437 (1971).....	5, 10
<i>Golden v. Biscayne Bay Yacht Club</i> , 521 F.2d 344 (C.A. Fla. 1975).....	10
<i>Horace Mann League v. Board of Public Works</i> , 242 Md. 654, 220 A2d 51 (1966).....	2
<i>Ingraham v. Wright</i> , 525 F.2d 909 (C.A.Fla. 1976).....	14
<i>Jones v. Tennessee Eastman Co.</i> , 397 F.Supp. 815 (D.C. Tenn. 1974) affirmed 519 F.2d 1402.....	10
<i>Massachusetts Universalist Convention v. Hildreth & Rogers Co.</i> , 183 F.2d 497 (C.A. Mass. 1950).....	9
<i>McCollum v. Board of Education</i> , 333 U.S. 203 (1948).....	5

(iii)

Cases (cont.):

<i>Meek v. Pittenger</i> , 421 U.S. 349 (1975).....	5
<i>George Reynolds v. United States</i> , 98 U.S. 244 (1879).....	5
<i>State v. Standard Oil Co. of Louisiana</i> , 178 So. 601.....	14
<i>U.S. ex. rel. Richardson v. Wolff</i> , 525 F.2d 797 (C.A. Ill. 1975).....	14
<i>U.S. Nat. Bank of Portland v. Snodgrass</i> , 275 P. 2d. 860, 202 OR. 530, 50 A.L.R. 2d 725 (1954).....	9
<i>Matter of Valdez</i> , 540 P.2d 818 (N.M. 1975).....	14
<i>Walz v. Tax Commission of City of New York</i> , 397 U.S. 664, 90 S.Ct. 1409, 25 L.Ed. 2d, 697 (1970).....	5, 10
<i>Watson v. Jones</i> , 13 Wall 679, (1872).....	13

Statutes:

Civil Rights Act of 1964 as amended.....	2, 4
29 C.F.R. Sec. 1605.11, 42 U.S.C. Sec. 2000(e) (j).....	4

U.S. Constitutional Provisions:

Amendment 1, U.S. Constitution.....	4, 11
Amendment 14, U.S. Constitution.....	8, 11
Article I, Section 6, U.S. Constitution.....	8

(iv)

Other Authorities:

Madison, James, Memorial and Remonstrance.	5
Declaration of Independence.	6, 7
1776 Virginia Bill of Rights.	6
14 C.J.S. Sec. 4, <i>Civil Rights Supplement</i>	12
16 C.J.S. Secs. 27, 69, 71, 199, 200, 202, 206(1), 257, <i>Constitutional Law</i>	6, 7 8, 13, 14

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-478

PARKER SEAL COMPANY,

Petitioner,

v.

PAUL CUMMINS,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF AMERICANS UNITED FOR SEPARATION OF CHURCH
AND STATE AS AMICUS CURIAE

INTEREST OF AMICUS

Americans United for Separation of Church and State is a nonprofit educational corporation organized under the laws of the District of Columbia with national headquarters in the Washington D.C. area, with some 90,000 members in all the states of the United States. Its sole chartered purpose is to preserve the principle of separation of church and state as set forth in the First Amendment to the Constitution of the United States

and in the Constitutions of the several states, and to assist in the preservation of constitutional rights respecting this principle to the end of preserving religious liberty for the people of the United States.

Americans United for Separation of Church and State, popularly known as "Americans United" has members who are Sabbatarians and is especially concerned over developments which would infringe upon the religious liberties of such Sabbatarians in their relationships with the federal, state and local governments, with their employers and with their fellow citizens.

This amicus brief takes the position that § 703(a)(1) of the Civil Rights Act of 1964, and § 701(j) of the Civil Rights Act of 1964 as amended and which are found at 42 U.S.C.A. § 2000e-2(a)(1) and 42 U.S.C.A. § 2000e(j) respectively, are constitutional. This position is not motivated by any prejudice pro or con for any particular church or for any particular religion. As the Maryland Court of Appeals said in *Horace Mann League v. Board of Public Works*, 242 Md. 645, 220 A.2d 51 (1966):

"It should be noted at the outset that nothing in this opinion is intended as a criticism of, or a boost to, any religion, sect, or schism, or lack of religion. Our task is to decide a constitutional issue. We proceed to do just that, and that alone."

Therefore, it is Americans United's task to assist the Court in resolving the constitutional issue which is presented in this case and to promote the cause of religious liberty for all persons wherever they may be.

STATUTE INVOLVED

The statutory provision involved in this suit is § 703(a)(1) of the Civil Rights Act of 1964, as amended and § 701(j) of the Civil Rights Act of 1964, as amended, which are collectively known as Title VII of the 1964 Civil Rights Act, as amended.

THE QUESTIONS PRESENTED

The final questions presented by the petitioner in this appeal are as follows:

(1) Whether the statute and guidelines which require an employer to accord preferential treatment to selected employees solely on the basis of their religious beliefs, violate the Establishment Clause of the First Amendment.

(2) Whether the Court of Appeals erred in determining that an employer which has tried, unsuccessfully, to accommodate an employee who refuses to work regularly scheduled Saturdays is barred from showing that its continued efforts impose undue hardship.

Amicus believes that the overriding question for the Court to determine is whether or not the Congress of the United States has the constitutional power to safeguard the religious liberty of an individual from infringement by a fellow citizen and, more specifically, his employer.

STATEMENT OF THE CASE

Paul Cummins, respondent, was employed by Parker Seal Company, petitioner, in 1958 and worked as a production scheduler until May of 1965 when he was made a supervisor. In July of 1970, respondent joined the World Wide Church of God, which forbids work on the Sabbath (Friday sundown to Saturday sundown) and on certain holy days. From the time respondent joined the World Wide Church of God, he refused to work on Saturdays. After approximately one year of accommodation and after complaints arose from fellow supervisors who were forced to substitute for him on Saturdays, the respondent was discharged.

After filing charges with the Economic Employment Opportunity Commission and a similar complaint with the Kentucky Commission on Human Rights, an action was filed in the United States District Court for the Eastern District of Kentucky, Lexington Division. After the dismissal of the complaint, appeal was made to the United States Court of Appeals for the Sixth Circuit. The United States Court of Appeals reversed and remanded.

Parker Seal Company filed a petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit which was granted by this court.

The issue brought before the Court, among others, is the claim by petitioner that the Civil Rights Act of 1964 as amended and the EEOC guidelines violate the Establishment Clause of the First Amendment of the Constitution of the United States of America:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof;...."

SUMMARY OF ARGUMENT

That portion of the Civil Rights Act which bars discrimination because of religion is not an Establishment of Religion in Violation of the First Amendment of the Constitution of the United States of America.

The First Amendment and the Fourteenth Amendment apply only to Federal and State Government acts which include either *Sponsorship*, *Financial Support* or *Active Involvement* of the Sovereign in Religious Activity. The Act in question does none of these and only grants a remedy to an individual whose rights have been infringed by his employer. This the Congress can surely do as long as the rights granted are within the framework of the Due Process Clause.

ARGUMENT

Amicus will focus its Brief on the constitutionality of the Civil Rights Act which bars discrimination because of individual's ... religion....

Petitioner questions the constitutionality of 29 CFR § 1605.1- (1974) and 42 U.S.C. § 2000e(j) as laws "respecting an establishment of religion" as a violation of the First Amendment of the Constitution of the United States of America.

Amicus wishes to point out to the Court that the First Amendment does not make the grant of religious freedom, but merely protects it from being interfered with by the federal government by specifically prohibiting the Congress from making a law respecting an establishment of religion or a law prohibiting the Congress from making a law respecting an estab-

lishment of religion or a law prohibiting the free exercise thereof. This has been interpreted in all cases as preventing sponsorship, financial support by, and active involvement of the federal government in religious activity. See *Walz v. Tax Commission* 397 U.S. 644 (1970) where Chief Justice Burger stated "It is sufficient to note that for the men who wrote the Religious Clauses of the First Amendment the 'establishment' of a religion connoted sponsorship, financial support, and active involvement of the sovereign in religious activity." See *McCullum v. Board of Education*, 333 U.S. 203 (1948) and *Everson v. Board of Education*, 330 U.S. 1; *Abington School District v. Schempp*, 374 U.S. 203 (1963); *Board of Education v. Allen*, 392 U.S. 236 (1968); *Bradley v. School Board*, 416 U.S. 696 (1974); *Braunfield v. Brown*, 366 U.S. 599 (1961); *Committee of Public Education v. Nyquist*, 413 U.S. 756 (1973); and *Gillette v. United States*, 401 U.S. 437 (1971); *Meek v. Pittenger*, 421 U.S. 349 (1975) and the cases cited therein.

The Act under consideration contains no financial support, creates no active involvement of the Sovereign in any form of religious activity. The only possible religious activity involved is the free exercise of the individual freeing him from unreasonable interference and coercion by his employer, thus allowing him the freedom to attend his chosen church on its designated Sabbath.

For an historical view of the First Amendment, see *George Reynolds v. United States*, 98 U.S. 244, 249.

In *Reynolds* the Court, in studying the historic background of the First Amendment, recited several quotes from Mr. Madison's *Memorial and Remonstrance* and from Mr. Jefferson's works regarding a bill before the Virginia House of Delegates in 1784, "A bill establishing provisons for teachers of the Christian religion." At the session when this bill was defeated, a bill was introduced by Mr. Jefferson, "for establishing religious freedom." In the preamble of this Act ... religious freedom is defined; and after a recital "that to suffer the civil magistrate to intrude his powers into the field of opinion, and to restrain the profession or propagation of principles on supposition of their ill tenancy, is a dangerous fallacy which at once destroys all religious liberty."

It is declared "that it is time enough for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts against peace and good order." Further quoting from Jefferson's works, the Court said: "Believing with you that religion is a manner which lies solely between man and his God; that he owes account to none other for his faith or his worship, that the legislative powers of the government reach actions only, and not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should 'make no law respecting an establishment of religion or prohibiting the free exercise thereof', thus building a wall of separation between church and state. Adhering to this expression of the Supreme will of the nation in behalf of the rights of conscience, I shall seek, with sincere satisfaction, the progress of those sentiments which tend to restore man to all his natural rights, convinced he has no natural right in opposition to his social duties."

The Declaration of Independence states "...that they [all men] are endowed by their creator with certain inalienable rights; that among these are life, liberty and the pursuit of happiness. . . ."

James Madison stated that "...the right of every man is to liberty. . ." and not merely to toleration. Mr. Madison was successful in getting the word "toleration" in the 1776 Virginia Bill of Rights modified to read "all men are equally entitled to the free exercise of religion according to the dictates of Conscience."

Personal Liberty, or the right of the enjoyment of Life and Liberty, is one of the fundamental or Natural rights of mankind and is not derived from or dependent on the Federal Constitution, but is one of the most Sacred and Valuable rights, and this right is considered to be inalienable. See 16 C.J.S. Sec. 202, p. 987.

The elementary rights of Life, Liberty and Property, are the Natural rights of men and existed before the adoption of the Constitution.

The first ten amendment to the Federal Constitution, being limitations on the Federal Government only, were not intended to

lay down any novel principles of government, but simply embodied certain guaranties and immunities which we had inherited from our English ancestors. See C.J.S. Sec. 200, p. 984.

In view of their origin and long use the principles contained in the Bill of Rights cannot be regarded as new matters or new proscriptions. The purpose of the Bill of Rights was to preserve ancient principles from government interference. See 16 C.J.S. Sec. 27, p. 100.

The basic principle of our constitutional system is that all political power is inherent in the people and the government has such power as the people grant to it. Therefore the rights are those of the people and not rights established by government. A Constitutional right differs from a right conferred by the Common law or by statute only in the fact that it is guarded from attack or interference by the legislature, or any other governmental agent of the states. See 16 C.J.S. Sec. 199.

The entire social and political structure of the United States rests on the cornerstone that all men have certain basic rights which are inherent and inalienable.

The purpose of the Bill of Rights was to withdraw these subjects from the vicissitudes of political controversy and to place them beyond the reach of majorities and governmental officials. They are left then as legal principles to be applied by the Courts. See 16 C.J.S. Sec. 199.

The right to worship is considered to be one of the principles included in the word "Liberty" as set forth in the Declaration of Independence and is most adequately set forth in 16 C.J.S. Sec. 206(1) p. 1017 as follows:

"The right to worship according to the dictates of one's own conscience and reason and to be free from molestation or restraint in his person, liberty, or estate in such worship, is a natural, fundamental, and inalienable right, available to every individual, provided he does not disturb others. The right is not subject of a direct constitutional grant. This right is fundamental in a free government as is the right to life, liberty, or the pursuit of happiness.

"The people of the various states, and of the United States, as a political entity, have no creed or religion. Freedom of worship is constitutionally recognized and confirmed as an attribute of liberty incident to all persons under the constitution and laws of the United States, regardless of their citizenship. Article 6 of the Constitution of the United States provides that 'no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States,' and, by the First Amendment, it is further provided that 'congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.'"

These provisions effectively guarantee the religious liberty of the individual against infringement by the Federal Government, or agencies of the Federal Government and the Fourteenth Amendment prohibits the making or enforcing of laws which abridge privileges or immunities, and deprivation of Life, Liberty or Property without due process of law . . . and provides protection of the individual against infringement of the rights by the State Government.

Neither the provisions of the Bill of Rights nor the Fourteenth Amendment constitute any protection against action by private individuals, or protect individual rights from individual invasion. See 16 C.J.S. Sec. 69 p. 185. Also see 16 C.J.S. Sec. 206(1) p. 1023 which states as follows:

"...These guaranties are limitations on the powers of the government, and not on the rights of the governed; they proscribe governmental action, and do not bind the actions of private corporations or organizations, and have no bearing on individual actions or transactions. . ."

The courts have also had occasion to state that these protections do not apply to individual actions. See the following:

"Purpose of the Free Exercise Clause of this amendment is to secure religious liberty in the individual by prohibiting any invasion thereof by civil authority. *School Dist. of*

Abington Tp., Pa. v. Schempp, Md. & Pa. 374 U.S. 203, 83 S. Ct. 1560, 10 L.Ed. 2d 844 (1963).

"'Freedom of worship' is not the subject of direct constitutional grant, but it is constitutionally recognized and confirmed as an attribute of liberty incident to all persons under Constitution and laws of the United States regardless of their citizenship, and, as such, it is secured by this clause against abridgment by Congress and by Amend. 14 against deprivation by a state without due process of law." *Douglas v. City of Jeannette, Pa.*, 319 U.S. 157, 63 S.Ct. 877, 87 L.Ed. 1324.

"This amendment was designed to provide a bulwark against those who wish to impose their religious beliefs upon others through government action." *DeSpain v. DeKalb County Community School Dist.* 428 C.A.Ill. 1967, 384 F.2d 836. Certiorari denied, 390 U.S. 906, 88 S.Ct. 815, 19 L.Ed. 2d 873.

"Constitutional provisions relating to religion proscribe governmental action and do not erect shield against merely private conduct, however discriminatory or wrongful." *Carr v. St. John's University, New York*, 1962, 231 N.Y.S. 2d 403, 34 Misc. 2d 319, reversed on other grounds, 231 N.Y.S. 2d 410, 17 A.D. 2d 632, affirmed 235 N.Y.S. 2d 834, 12 N.Y. 2d 802, 187 N.E. 2d 18.

"This amendment is a limitation upon the power of Congress, and has no effect upon the transactions of individual citizens." *U.S. Nat. Bank of Portland v. Snodgrass*, 1954, 275 P. 2d 860, 202 Or. 530, 50 A.L.R. 2d 725.

"This amendment prohibiting Congress from making a law prohibiting the free exercise of a religion, or abridging freedom of speech, binds only the action of Congress or of agencies of the federal government and not the actions of private corporations." *Massachusetts Universalist Convention v. Hildreth & Rogers Co.*, C.A. Mass. 1950, 183 F.2d 497.

"This clause prohibits state from depriving any person of life, liberty, or property without due process of law, but adds nothing to right of one citizen as against another." *Barrera v. Security Bldg. & Inv. Corp., C.A. Tex.* 1975, 519 F.2d 1166.

"This clause erects no shield against merely private conduct, however discriminatory or wrongful." *Barrera v. Security Bldg. & Inv. Corp., Id.*

"This clause does not prohibit the individual invasion of individual rights." *Golden v. Biscayne Bay Yacht Club, C.A.Fla.* 1975, 521 F.2d 344.

"Private exercise of freedom of association must function without significant state support and involvement." *Id.*

"This clause prohibits discriminatory action by state but erects no shield against private conduct, however discriminatory or wrongful." *Jones v. Tennessee Eastman Co., D.C. Tenn.* 1974, 397 F.Supp. 815, affirmed 519 F.2d 1402.

It appears clear that the Establishment and Free Exercise Clause of the First Amendment applies only to the Federal Government and was never intended to apply to individual actions.

It also appears clear that the Establishment and Free Exercise Clause of the First Amendment was intended to afford protection against sponsorship, financial support, and active involvement of the sovereign in religious activity. See *Early v. DiCenso* (1971) 403 U.S. 602, 91 S. Ct. 2105, 29 L.Ed. 2d 745. This Court stated in *Gillette v. U.S.* (1971) 401 U.S. 437, 91 S.Ct. 828, 28 L.Ed. 2d 168 that the "central purpose of the establishment clause of this amendment is to insure governmental neutrality in matters of religion."

The Court in *Walz* in 1970 stated that:

"Under this amendment, neither governmentally established religion nor governmental interference with religion will be tolerated, but, short of those expressly proscribed governmental acts, there is room for a benevolent neutrality

permitting religious exercise to exist without sponsorship and without interference." *Walz v. Tax Commission of City of New York, N.Y.* 1970, 397 U.S. 664, 90 S.Ct. 1409, 25 L.Ed. 2d 697.

The foregoing make it clear that the Establishment and Free Exercise Clauses of the First Amendment do not apply to the acts of individuals.

It is also clear that government does not reach the point of violating the Establishment Clause where there is no government activity which would be classed as sponsoring, financial support and/or active involvement in religious activity.

The statutes and guidelines involved in this case have none of these attributes and do nothing more than to afford a remedy to an individual who has had his fundamental right to Free Exercise of Religion interfered with, not by government but by a person (corporation is an artificial being created by law). As clearly indicated above, an individual had no protection from such interference except as the criminal law applied.

It should also be mentioned that the statutes involved apply to all persons alike, not just the World Wide Church of God, which is before the Court, or just those who are Sabbatarians. This is true notwithstanding the comments of Mr. Randolph as sponsor of the amendment to include religion in the Civil Rights Act of 1964 as amended.

It is therefore the position of Amicus that the statutes and guidelines in question are not an establishment of religion, but are extensions of the Civil Rights Act, which give individuals a right of redress against those who would interfere with those "inalienable rights of Life, Liberty, and the Pursuit of Happiness."

We know that the First Amendment and the Fourteenth Amendment with the help of the Courts protect us from having our Religious Liberty eroded by Congress and the States.

The question before the Court in this case is whether Congress can pass a law to protect us from each other?

It would, we think, be absurd to think otherwise, for if Government does not have the power to protect an individual from the acts of another individual it lacks the power to continue in existence. Without government protection there is no freedom. And as Emerson asked:

"For what avail the plough or sail
Or land, or life, if freedom fail?"

Corpus Juris Secundum further answers our question at 14 C.J.S. Supp. Civil Rights Sec. 4, as follows:

"Civil Rights legislation enacted by Congress has generally been held to be as constitutional . . .

"The Acts of Congress which are collectively known as the Civil Rights Acts, are regarded as a valid exercise of the power conferred on Congress, particularly by the Thirteenth Amendment, and any doubts as to the power of Congress to enact such legislation was resolved by the adoption of the Fourteenth Amendment.

"Congress has the power to enforce provisions of the Fourteenth Amendment against persons representing the state whether they act in accordance with their authority or misuse it, and it has the power under the Fourteenth Amendment to reach purely private acts of racial discrimination which are violative of the Civil Rights Acts.

"Provisions of the Civil Rights Act of 1964, create new categories of civil rights, and these provisions reach any person and any action which interferes with the enjoyment of the civil rights secured by the statute.

"While it has been held that a criminal statute which prohibits discrimination with respect to a particular class creates civil rights in the members of the class, the statute denouncing the offense of depriving citizens of rights protected by the Constitution and laws does not confer rights, privileges, or immunities upon an individual, but merely safeguards those rights which he possesses by making violation of them a crime."

In regard to the validity of a statute, Corpus Juris Secundum states:

"It may be stated as a general rule that the validity of a state statute depends on whether or not it attempts to validate and legalize action or a course of conduct which the constitution forbids. More specifically, in view of the rules, generally recognized, as to the nature of a state constitution, and as to the powers of a state legislature, set forth *supra* § 70, rules usually recognized and applied are that, in so far as the state constitution is concerned, the question is not as to whether the power to enact the statute has been granted, but is as to whether power has been prohibited or denied by such constitution, and that the only test of the validity of an act regularly passed by a state legislature is whether or not it violates limitations or prohibitions imposed by the state or federal constitutions in express terms or by implication." See 16 C.J.S. § 71, p. 210.

The statutory scheme here involved does not, as previously shown, violate the Constitutional prohibition against the Establishment of a Religion.

This court said in *Watson v. Jones* that:

"In this country the full and free right to entertain any religious belief, to practice any religious principle, and to teach any religious doctrine which does not violate the laws of morality and property, and *which does not infringe personal rights*, is conceded to all. The law knows no heresy, is committed to the support of no dogma, the establishment of no sect." (emphasis added) *Watson v. Jones*, Ky., 13 Wall, 679, 728.

The granting of rights under the Civil Rights Acts does infringe upon the personal rights of others whom are involved and the property rights of the employers who will of necessity have to make some accommodations.

The granting of Rights to one person will nearly always infringe on the wishes of others. However, courts have in cases similar

to this stated that "no vested rights are impaired by statute which creates a remedy for an existing right for which there has been no remedy (see *State v. Standard Oil Co. of Louisiana*, 178 So. 601, 611, 613). Acts providing a new remedy, or enlarging on existing remedy does not impair any vested rights. (see *Cronheim v. Loveman*, 142 So. 550 also 16 C.J.S. Sec. 257 p. 1251).

Even though the employer had no vested rights under *State v. Standard Oil Co. of Louisiana* and *Cronheim v. Loveman* we concede that there must be a balancing of rights under the principle of "Due Process of Law."

Due Process is not a rigid and inflexible formula but is an elusive concept which varies according with the factual context. See *Expert Elect., Inc. v. Levine*, D.C.N.Y. 1975, 339 F.Supp. 893. See also *Matter of Valdez*, N.M. 1975, 540 P.2d 818. Minimum Due Process is neither inflexible nor graven in stone, (*U.S. ex. rel. Richardson v. Wolff*, C.A.Ill. 1975, 525 F.2d 797.) but is a concept premised on fairness and reasonableness in light of total circumstances. See *Ingraham v. Wright*, C.A.Fla. 1976, 525 F. 2d. 909. The clause only requires a balance between what may be conflicting interest in order to arrive at what is substantially fair and just (see *Bradford v. Weinstein*, C.A.N.C. 1974, 519 F.2d 128, Certiorari granted 95 S.Ct. 2394).

Amicus will not address itself to the merits of the Due Process of the particular facts of this case except to say that the burden of compliance with this act should not fall wholly on either party.

It appears to us that discharge without accommodation is violating the Due Process Rights of the employee and making his insistence upon exercising his "Religious Liberty" or being without a livelihood is placing too great a burden on "Religious Liberty" and violating Due Process of Law as well as the statutory guarantee of "Religious Liberty."

On the other hand, to require the employer to pay an individual for not working or for time off to attend worship services would place an equally unacceptable burden on the employer. It appears that a balance must be had in order to do justice to all parties under the "Due Process Clause."

CONCLUSION

For the reasons stated above, the Court should affirm the Judgment of the United States Court of Appeals for the Sixth Circuit, with opinion on the principles of constitutional law involved.

Respectfully submitted,

Americans United for Separation of
Church and State, *Amicus Curiae*

James W. Respass
8120 Fenton Street
Silver Spring, Maryland 20910

Telephone (301) 589-3707
Attorney for Amicus
July 19, 1976

JUL 30 1976

MICHAEL RODAK, JR., CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-478

PARKER SEAL COMPANY, *Petitioner*

versus

PAUL CUMMINS, *Respondent*

On Writ of Certiorari to the United States
Court of Appeals for the Sixth Circuit

**BRIEF FOR THE NATIONAL JEWISH COMMISSION
ON LAW AND PUBLIC AFFAIRS ("COLPA")
AS AMICUS CURIAE**

NATHAN LEWIN
2555 M Street, N.W., Suite 500
Washington, D. C. 20037

SIDNEY KWESTEL
425 Park Avenue
New York, New York 10022

DENNIS RAPPS
66 Court Street
Brooklyn, New York 11201

*Attorneys for the National Jewish
Commission on Law and Public
Affairs ("COLPA"),
Amicus Curiae*

Of Counsel:

HOWARD I. RHINE
AARON KINDERLEHRER

TABLE OF CONTENTS

	Page
INTEREST OF THE AMICUS	1
QUESTIONS PRESENTED	3
STATEMENT	4
ARGUMENT	6
Introduction and Summary	6
I. The Establishment Clause Is Not Violated By Statutory Protection For An Employee's Religious "Observance And Practice" Which Requires A Private Employer To Make "Reasonable Accommodation" To Such Reli- giously Motivated Conduct	8
A. Our Suggested Test of Constitutionality ..	11
B. The Tripartite Test	16
1. Purpose	16
2. Effect	20
3. Entanglement	21
II. "Undue Hardship" Has Not Been Estab- lished Where The Duties Of The Employee Who Is Unavailable For Work May Be Readily Assumed By Others	23
CONCLUSION	30

CITATIONS

CASES:

<i>Braunfeld v. Brown</i> , 366 U.S. 599 (1961)	12
<i>Cantwell v. Connecticut</i> , 310 U.S. 296 (1940)	6
<i>Griffin v. Breckinridge</i> , 403 U.S. 88 (1971)	15
<i>Griggs v. Duke Power Co.</i> , 401 U.S. 424 (1971)	27
<i>Hardison v. TWA, Inc.</i> , 527 F.2d 33 (8th Cir. 1975), certiorari pending, No. 75-1126	7
<i>Johnson v. Railway Express Agency</i> , 421 U.S. 454 (1975)	15
<i>Jones v. Alfred H. Mayer Co.</i> , 392 U.S. 409 (1968) ..	15

	Page
<i>Jordan v. North Carolina Nat'l Bank</i> , 399 F. Supp. 172 (W.D. N.C. 1975)	7
<i>McGowan v. Maryland</i> , 366 U.S. 420 (1961)	12
<i>Meek v. Pittenger</i> , 421 U.S. 349 (1975)	10
<i>PEARL v. Nyquist</i> , 413 U.S. 756 (1973)	16, 20
<i>People v. Marquis</i> , 291 Ill. 121, N.E. 757 (1919)	14
<i>Roemer v. Board of Public Works</i> , No. 74-730, 44 U.S. Law Week 4939 (U.S., June 21, 1976)	10, 21
<i>Scott v. Southern California Gas Co.</i> , 8 E.P.D. ¶ 9450 (C.D. Cal. 1973)	7
<i>Selective Draft Law Cases</i> , 245 U.S. 366 (1918)	8
<i>Sherbert v. Verner</i> , 374 U.S. 398 (1963)	8, 12, 22
<i>Ward v. Allegheny Ludlum Steel Co.</i> , 397 F. Supp. 375 (W.D. Pa. 1975)	7
<i>Welsh v. United States</i> , 398 U.S. 333 (1970)	9
<i>Wisconsin v. Yoder</i> , 406 U.S. 205 (1972)	13
 MISCELLANEOUS:	
<i>Levy, Judgments</i>	16
118 <i>Cong. Rec.</i> 705-731	18, 19
<i>Deuteronomy V</i> , 2, 14	2
 STATUTES AND REGULATIONS:	
26 U.S.C. § 1402(h)	14
29 U.S.C. § 621	17
Md. Code Ann., art. 22, ¶ 6	14
N.Y. Civ. Rights Law § 79-i (McKinney Supp. 1975) ..	14
5 C.F.R. § 713.204(g)	25
29 C.F.R. § 1605.1	2

IN THE
Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-478

PARKER SEAL COMPANY, *Petitioner*

versus

PAUL CUMMINS, *Respondent*

On Writ of Certiorari to the United States
Court of Appeals for the Sixth Circuit

**BRIEF FOR THE NATIONAL JEWISH COMMISSION
ON LAW AND PUBLIC AFFAIRS ("COLPA")
AS AMICUS CURIAE**

This brief is being filed with the consent of the parties.

INTEREST OF THE AMICUS

COLPA is a voluntary association of attorneys and social scientists organized to combat all forms of religious prejudice and discrimination and to represent the position of the Orthodox Jewish community on matters of public concern. The federal regulation and legislation challenged by petitioner—Section 1605.1 of the EEOC Regulation and Title VII of the Civil Rights Act of 1964, as amended in 1972 by the addition

of Section 701(j)¹—and similar State anti-discrimination laws have opened employment doors which had previously been closed to the Sabbath observer. Orthodox Jews, who are enjoined by Biblical command to “observe the Sabbath day and keep it holy” and “not [to] do any manner of work” on that day (*Deuteronomy* V, 2, 14), did not enjoy equal employment opportunities and were barred by employment policies from positions open to other individuals in our society. They were turned away from job after job and suffered economic hardship only because they steadfastly refused to violate the Biblical injunction against working on the Sabbath. Before the enactment of these laws, Sabbath observers were “free” to practice their religion, but this “freedom” often carried a severe penalty—inability to secure employment, and loss of jobs when their Sabbath observance became known.

With the announcement of Section 1605.1 and enactment of Section 701(j) (as well as similar State laws), there dawned a new era in which Sabbath observance was no longer the obstacle to employment it once had been. Recognizing the crucial importance of employment opportunities for *all* Americans, the EEOC, and then the Congress, directed that an employer may not reject or terminate a Sabbath observer unless the employer establishes that his employment or retention would cause undue hardship to the operation of his business. The law made the phrase “equal employment opportunity” a reality for the religious observer in our society.

¹ References made to “Section 701(j)” in this brief should generally be taken to include 29 C.F.R. § 1605.1 (1975), which is the model on which the 1972 legislation was based and which, according to its legislative history, was meant to be enacted into law by Congress in 1972.

Hence the statute under attack is of vital importance to our community. Its salutary effect cannot be overemphasized. In the past ten years COLPA has assisted hundreds of individuals in informally enforcing their rights under this statute and under similar State antidiscrimination laws. These cases have involved the widest variety of employment. We can attest to the fact that numerous individuals have become gainfully employed, enjoying equal benefits with all other citizens. We can also attest to the fact that in nearly all cases where “hardship” has initially been asserted by an employer, and where the Sabbath-observing employee has then been hired or retained because of the operation of law notwithstanding the expected “hardship,” the reality has belied the anticipation. “Hardship” is too often a facile excuse for an unwillingness to undergo some slight inconvenience, or to depart from an inflexible policy, whose inflexibility is unsupported by reason. Congress’ enactment of this law, cast in terms of moderation, reasonableness and deference to actual proof of legitimate employer hardship, is a sound and sensible means of prohibiting thoughtless discrimination while acknowledging those instances where real hardship exists. This Court should not overturn so considered and thoughtful a legislative judgment.

QUESTIONS PRESENTED

1. Whether the Establishment Clause of the First Amendment is violated by a federal interpretive regulation of the EEOC and a federal statute which require private employers to make “reasonable accommodation” to the religious observances and practices of their employees and forbid rejections, demotions or refusals

to promote religious observers unless an employer can demonstrate that an employee's religious observance creates "undue hardship" on the conduct of his business.

2. Whether the "undue hardship" standard of Section 701(j) of the Civil Rights Act of 1964, as amended, is satisfied by proof that co-employees were unhappy that a religious observer was absent on Saturdays without any proof of financial harm caused by his absence or any effort by the employer to adjust overtime work schedules or pay scales to achieve a fair distribution of supervisors' overtime assignments.

STATEMENT

In April or May 1969, Paul Cummins—an employee of more than ten years' standing at the Parker Seal Co. plant in Berea, Kentucky—began regular attendance, with his family, at the Sabbath services of the World Wide Church of God in Lexington. The Church, which has other congregations in Kentucky at Bowling Green, Louisville and Covington (R.98), observes the Sabbath from sundown on Friday to sundown Saturday, and a fundamental tenet of its faith is that members in good standing may not engage in "normal labor and work" on the Sabbath, but must spend that day in church attendance and total rest (R. 37, 52).

Mr. Cummins was, by this time, a supervisor of the "Banbury" department of the plant, and he was requested to work in this capacity at times other than the 40 hours a week which comprise the normal work schedule at the plant. When the overtime was scheduled for Saturdays—which happened, on an average, every other week—Mr. Cummins would work part of the day and then leave to take his family to the Sab-

bath services (R.61-62). On his departure, the supervising of the 8 to 10 employees in the "Banbury" department was done by the foreman of the adjoining department (R. 63). Mr. Cummins worked on Sundays whenever the plant ran on that day, and he advised those in the adjoining department that he was available "to fill in at any other time than my Sabbath or an annual holy day" (*ibid.*).

Sometime in July 1970, Mr. Cummins became a full member of the Church and began total observance of the Sabbath. He advised his superiors—the general foreman and the plant manager—that he would no longer be available for any Saturday work, but that he was ready to work at "any other time . . . he could name the hours or the time, what he wanted me to do and I would be glad to take care of that" (R. 65). After considering the matter for a few days, the man who was then plant manager, Conley Saylor, told Mr. Cummins that he "still had a job and that [he] could observe the Sabbath" (R. 66). Thereafter, Mr. Cummins did not work on Saturdays, but he did fill in for others and told the supervisors in other departments that he "would be glad to work for them anytime that they needed relief" (R. 67-68). He told Saylor, according to the latter's testimony, "I'll come in and work Sunday or any other hours that you ask me to irregardless (*sic*) of what they might be. Outside of Saturday I'll work any hours that you request that I do so" (R. 115-116). It was not necessary to hire any extra person to do Cummins' work while he was absent; the supervisor in the adjoining department ("Stock Prep.") covered the job (R. 117, 196).

In November 1970, Saylor was replaced by a new plant manager, L. G. "Dutch" Haddock (R. 210).

Haddock testified that he was assigned to Berea from another Parker plant because there were "economic" and "supervisory" problems in Berea which he was to straighten out (R. 173). Haddock testified that he did not learn that Cummins was absent on Saturdays until either the Spring or the Summer of 1971—more than half-a-year after he came on the job (R. 173-174). When he learned that Mr. Cummins' unavailability was based on religious conviction, he talked to Cummins and told him that he had "a complaint" from another supervisor about Cummins not working on Saturdays (R. 71). Haddock asked Cummins "if there was any possibility of his being able to change his ideas or anything like that," and Cummins replied that "he was firmly fixed with his religion" (R. 178). Haddock then advised Cummins that he was fired because he was unavailable for work on Saturdays.

ARGUMENT

Introduction and Summary

This Court has recognized, at least since *Cantwell v. Connecticut*, 310 U.S. 296, 303-304 (1940), that the fundamental principles underlying the Religion Clause of the First Amendment protect not merely "freedom to believe" according to one's religious scruples, but also "freedom to act" in accordance with the tenets of a religious creed. This case is of critical concern to the many thousands of Americans whose religious convictions require them to perform specified acts or to refrain from certain kinds of conduct at particular times. The constitutional question presented is whether Congress violates the Establishment Clause of the First Amendment if it gives explicit legislative recognition and particularized protection, in the context of an

employment relationship, to conduct that is compelled by a religious faith. That question must be considered in light of the limitations expressed by the Congressional enactment to the statutory right being conferred. Only *reasonable* accommodation is required, and an exemption is permitted if there is proof of *undue* hardship to the employer's business. Federal courts considering Section 701(j) have, for these reasons, determined that it is constitutional. *Hardison v. TWA Inc.*, 527 F.2d 33 (8th Cir. 1975), certiorari pending, No. 75-1126; *Jordan v. North Carolina Nat'l Bank*, 399 F. Supp 172 (W.D.N.C. 1975); *Ward v. Allegheny Ludlum Steel Co.*, 397 F. Supp. 375 (W.D. Pa. 1975); *Scott v. Southern California Gas Co.*, 8 EPD ¶9450 (C.D. Cal. 1973).

The statutory question presented by this case is whether legislative protection for employees was intended by Congress to be overridden by proof of dissatisfaction on the part of other employees over the greater safeguards given to religiously motivated practice than to nonreligious preferences. That question must be considered in light of the superficial and facile explanations that may be made, on grounds of "even-handedness," for discriminations based on religious observance.

This Court has long recognized that religion—like speech—is entitled to special protection, not merely by virtue of the constitutional language but also through legislative implementation of "free exercise values." These "values" arise not only in governmental relationships controlled directly by the First and Fourteenth Amendments but also in private relationships subject to legislative regulation, such as private em-

ployment. And it should be as firmly established in the area of religious rights, as it is with respect to the rights of racial equality and rights to suffrage and speech, that hostility by others or popular inability to understand judicial and legislative protection does not justify destruction of a minority's rights.

Accordingly, we argue *first* that when Congress is merely defending or shielding a religious observance against thoughtless or hostile discrimination by a private employer, the test of constitutionality is whether the statutory protection reasonably implements the legislative objective. In that circumstance, where religious observance is "aided" only in the sense that its exercise is facilitated, and where the observance poses no "substantial threat to public safety, peace or order" (*Sherbert v. Verner*, 374 U.S. 398, 403 (1963)), any reasonable legislative protection is enough to overcome First Amendment objections. We then argue that the tripartite test applied in the financial-aid-to-private-school cases is, in any event, satisfied.

I

The Establishment Clause Is Not Violated By Statutory Protection For An Employee's Religious "Observance And Practice" Which Requires A Private Employer To Make "Reasonable Accommodation" To Such Religiously Motivated Conduct .

The constitutional challenge to Section 701(j) of the Civil Rights Act of 1964, as amended in 1972, is, in principle, similar to the constitutional challenge that was made and summarily rejected by this Court almost 60 years ago in the *Selective Draft Law Cases*, 245 U.S. 366, 389-390 (1918). Speaking there of the conscientious objector exemption of the draft law,

which was limited to adherents to established religious groups, Chief Justice White said for a unanimous Court (emphasis added):

And we pass without anything but statement the proposition that an establishment of a religion or an interference with the free exercise thereof, repugnant to the 1st Amendment, resulted from the exemption clauses of the act to which we at the outset referred *because we think its unsoundness is too apparent to require us to do more.*

The constitutionality of the conscientious objector exemption has been the subject of more recent analysis in this Court. Relevant to this case is the separate opinion of Mr. Justice White, speaking also for the Chief Justice and Justice Stewart, in *Welsh v. United States*, 398 U.S. 333, 367-374 (1970). The issue discussed in the separate *Welsh* opinion was whether the Establishment Clause permitted Congress to treat differently, for draft exemption purposes, those whose conscientious objections grow out of religious belief than those "whose views about war represent a purely personal code arising not from religious training and belief . . . but from readings in philosophy, history, and sociology." 398 U.S. at 367. The three dissenters in *Welsh*—treating the constitutional issue not reached by the majority—concluded, in terms applicable here, that "free exercise values" may justify legislative action "shielding religious objectors" while denying the same protection to the nonreligious, and that such legislation does not violate the Establishment Clause.

Petitioner's constitutional claim is basically that any special recognition of religion amounts to a preference of religion over nonreligion and necessarily violates the three-part Establishment Clause test most recently

applied in *Meek v. Pittenger*, 421 U.S. 349, 350 (1975), and in *Roemer v. Board of Public Works*, No. 74-730, 44 U.S. Law Week 4939 (U.S., June 21, 1976). We believe, for reasons discussed at some length below, that the three-part test is not violated by Section 701(j). But we submit initially that the three-part test is, at all events, not the proper constitutional measure for a law that is defensive in nature in that it is designed to secure, against discriminatory consequences, the exercise of religious beliefs and practices that do no harm to society and that are based on solemn and sincere religious scruple.

We note, preliminarily, that this was precisely the approach taken by the Chief Justice, and Justices Stewart and White, in *Welsh*. Explaining their conclusion that a military exemption limited to religionists is not constitutionally invalid because it excludes nonreligious believers, the three Justices suggested initially that Congress' exemption for religious conscientious objectors may have been "a purely practical judgment that religious objectors, however admirable, would be of no more use in combat than many others unqualified for military service." 398 U.S. at 369. On this ground, it was said ((*ibid.*); emphasis added):

Exemption was not extended to them to further religious belief or practice but to limit military service to those who were prepared to undertake the fighting that the armed services have to do. *On this basis, the exemption has neither the primary purpose nor the effect of furthering religion.*

The remainder of the *Welsh* dissent discussed the alternative ground that Congress may have enacted

the conscientious objector provision as "a recognition . . . of free exercise values and its view of desirable or required policy in implementing the Free Exercise Clause." This latter discussion proceeded on the premise that Congress may *not* have made the "practical judgment" previously discussed—in other words, that the exemption for religious objectors may, in fact, have had either the primary purpose or effect of "aiding religion." Nonetheless, the Chief Justice and Justices Stewart and White concluded that the law was constitutional. On this approach, it appears that where Congress "aids" individual religious practice only to the extent of accommodating a legislative enactment to "free exercise values," its action does not violate the Establishment Clause even if a "purpose or effect" of the law is to assist religious believers.

(A) OUR SUGGESTED TEST OF CONSTITUTIONALITY

Obviously, every protection for religious liberty somehow "aids" or "furthers" religious activity. "It cannot be ignored that the First Amendment itself contains a religious classification." 398 U.S. at 372 (dissenting opinion in *Welsh*). The Civil Rights Act of 1964—even before the 1972 amendment at issue here—prohibited discrimination in employment on account of "religion." Even if that law protected only religious *belief* and not religious observance or practice, it would have had the "purpose and effect" of "furthering" religion by assuring to all those who professed a religious faith that they could not be harmed, in private employment, on account of their beliefs. Yet petitioner does not remotely challenge the law's application to religious belief.

Plainly, then, an anti-discrimination or protection-of-religious-liberty law is judged by different constitutional standards than laws, such as those in *Meek* and *Roemer*, which affirmatively provide financial assistance to private institutions or hand out other forms of bounty. This principle is proved by the accepted constitutional validity of religious exemptions from a variety of regulatory or other statutes. There seemed to be general agreement, for example, at the time of *Braunfeld v. Brown*, 366 U.S. 599 (1961), that an exemption for religious Sabbatarians from the operation of Sunday Closing Laws was constitutional, even though—by the Court's own reasoning—Sabbath-observers who keep their shops open on Sunday might thereby be given "an economic advantage over their competitors who must remain closed on that day." 366 U.S. at 608-609. Notwithstanding this possible advantage, the Court majority said that a Sabbatarian exemption "may well be the wiser solution to the problem." There was no suggestion that this solution might give rise to constitutional problems under the Establishment Clause because it necessarily "furthered" the practice of Sabbatarian faiths. See also *McGowan v. Maryland*, 366 U.S. 420, 512-520 (1961) (Frankfurter, J., concurring: "However preferable, personally, one might deem such an exception, I cannot find that the Constitution compels it.")

Various exemptions granted to religionists by court order or legislative action fall into the same category. In the landmark case of *Sherbert v. Verner*, 374 U.S. 398 (1963), for example, this Court determined that an exemption from compensation ineligibility was constitutionally required for Sabbatarians who are unable

to accept a job requiring Saturday work because of their conscientious scruples; the Court explicitly rejected the notion that such an exemption would be "fostering the 'establishment' of the Seventh-day Adventist religion in South Carolina." 374 U.S. at 409. Indeed, even the late Justice Harlan, who dissented in *Sherbert*, objected only to the ruling that an exemption was *constitutionally* mandated. 374 U.S. at 420. He noted his view "that at least under the circumstances of this case it would be a permissible accommodation of religion for the State, if it chose to do so, to create an exception to its eligibility requirements for persons like the appellant." 374 U.S. at 422.

A similar approach was followed in *Wisconsin v. Yoder*, 406 U.S. 205 (1972). Upon concluding that the Free Exercise Clause of the First Amendment requires Wisconsin to exempt Amish parents from certain provisions of the State's compulsory education law, the Court disposed, in a footnote, of the kind of claim made here (406 U.S. at 234-235, n. 22):

What we have said should meet the suggestion that the decision of the Wisconsin Supreme Court recognizing an exemption for the Amish from the State's system of compulsory education constituted an impermissible establishment of religion. In *Walz v. Tax Commission*, the Court saw the three main concerns against which the Establishment Clause sought to protect as "sponsorship, financial support, and active involvement of the sovereign in religious activity." 397 U.S. 664, 668 (1970). Accommodating the religious beliefs of the Amish can hardly be characterized as sponsorship or active involvement. The purpose and effect of such an exemption are not to support, favor, advance, or assist the Amish, but to allow their cen-

turies-old religious society, here long before the advent of any compulsory education, to survive free from the heavy impediment compliance with the Wisconsin compulsory-education law would impose. Such an accommodation "reflects nothing more than the governmental obligation of neutrality in the face of religious differences, and does not represent that involvement of religious with secular institutions which it is the object of the Establishment Clause to forestall." *Sherbert v. Verner*, 374 U.S. 398, 409 (1963).

Legislative exemptions for religionists have also been frequently enacted and consistently sustained. The Prohibition Act contained an exemption for the use of sacramental wine (41 Stat. 308), and the constitutionality of such an exemption was sustained in *People v. Marquis*, 291 Ill. 121, 125 N.E. 757 (1919). The federal tax laws now contain an exemption from the payment of Social Security taxes for members of the Amish sect. 26 U.S.C. § 1402(h). Special statutory provisions for those having religious objections to abortions or other terminations of pregnancy (*e.g.*, N.Y. Civ. Rights Law § 79-i (McKinney Supp. 1975)) or for those having religious objections to autopsies (*e.g.*, Md. Code Ann., art. 22, § 6, as amended 1976) have recently been enacted.

As to each of these judicial or statutory exemptions, as with the prevalent Sabbatarian exemptions to Sunday laws (*e.g.*, 366 U.S. at 553-559), it could be argued—as it is being argued here—that the "primary purpose and effect" of the particular provision is to aid religious practice. On its face, that is plainly true. But this Court recognized in *Yoder* that there is a constitutional difference between the "sponsorship or

active involvement" that is prohibited by the Establishment Clause and the essentially defensive protection granted by statutes such as this one to permit religious observances to be performed without the kind of impediment that might be caused by adverse employment consequences.

Nor is there any significance (as petitioner contends at pp. 38-40 of its brief) to the fact that in the above situations the exemption relates to a state-imposed regulation or prohibition, whereas Section 701(j) affects *private* employment. To be sure, in the absence of a statute prohibiting employment discrimination on account of religion, a private employer is not obliged by law to adjust his practices to the free exercise of religion by his employees—just as he is not obliged to refrain from discrimination on the basis of race or sex. But the values underlying the First Amendment surely entitle legislatures in this country to protect religious beliefs and practices against private coercion and intimidation. In *Griffin v. Breckinridge*, 403 U.S. 88, 104-107 (1971), this Court unanimously sustained the constitutionality of a Reconstruction civil rights act which, as construed, reached "private conspiracies to deprive others of legal rights." In that case, as in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968), and in *Johnson v. Railway Express Agency*, 421 U.S. 454 (1975), the Court recognized that private racial discrimination is subject to legislative condemnation on account of the same policies as sustain the prohibitions of the Fourteenth Amendment to state-imposed racial distinctions.

For the reasons stated above, we believe that the constitutionality of laws such as Section 701(j) under

the Establishment Clause should not be measured by the now-hallowed "tripartite" test applied when a form of state financial assistance to religion or an official religious exercise is authorized, sponsored or commanded by State law. Rather, the proper test should be whether the enacted legislation is a reasonable means of protecting the free exercise of religious beliefs and practices. The Constitutional draftsmen set no priority as between the Establishment and Free Exercise Clauses. Indeed, the history of the Religion Clause (set out fully by Professor Leonard W. Levy in "No Establishment of Religion: The Original Understanding," *Judgments* (1972), pp. 169-224) tends to show that the Establishment Clause was adopted as one means of securing the free exercise of religion—so that the latter is the more important of the two provisions. We disagree totally, therefore, with petitioner's assertion that in the case of a conflict between the Free Exercise and Establishment Clauses, non-establishment must "prevail" (Pet. Br. 39). This Court has recognized that "tension inevitably exists between the Free Exercise and the Establishment Clauses" (*PEARL v. Nyquist*, 413 U.S. 756, 788 (1973)), and the proper legislative duty is not to select one over the other but to see to it that both constitutional interests are taken into account.

(B) THE TRIPARTITE TEST.

Even, however, if the three-part test were applied, Section 701(j) would pass muster.

(1) *Purpose*—Viewed in context, Section 701(j)—which is a *definitional* provision—has an essentially secular purpose: to ensure that to the extent possible

employees are judged, by those affording employment opportunities, on the basis of their individual merit and not on the basis of considerations over which they have no personal control and which employers ought not to take into account. Just as employment discrimination based on sex, national origin, age (29 U.S.C. § 621) or race is forbidden by federal law, the 1972 amendment relating to religion prohibits employers from taking an employee's religious observance or practice into account. The purpose of a prohibition against discrimination on account of age, sex or national origin is not to "further" or "aid" any particular age, sex or national group; it is, rather, to keep invidious and unmeritorious considerations out of the employment process. Similarly, a prohibition against an employer's consideration of Sabbath-observance has, as its purpose, compelling employers to exclude such irrelevant factors from their decision-making process.²

The legislative background of Sec. 701(j) clearly indicates that it was designed to foster, in the area of religious discrimination, the overriding purpose of the Civil Rights Act of 1964—i.e., the promotion of equal employment opportunity. As the court below concluded (Pet. App., p. 33a):

[W]e believe that Regulation 1605 and § 2000e(j) are sustained by an adequate secular purpose. The reasonable accommodation rule, like Title VII as a whole, was intended to prevent discrimination in employment.

² The "undue hardship" proviso, on the other hand, permits a religious practice to be considered if there is a truly substantial effect on the business practice.

Senator Jennings Randolph, the bill's sponsor, specifically stated his purpose in presenting the amendment to the Senate: "[M]y desire and I hope the desire of my colleagues, to assure that freedom from religious discrimination in the employment of workers is for all time guaranteed by law" (118 *Cong. Rec.* 705). He then proceeded to detail the problems individuals faced in employment only because of religious requirements that they abstain from Saturday work. He observed that individuals under the Civil Rights Act of 1964 were intended, in his view, to be protected in their religious practices (118 *Cong. Rec.* 705-706):

This amendment, is intended, in good purpose, to resolve by legislation—and in a way I think was originally intended by the Civil Rights Act—that which the courts apparently have not resolved. I think it's needed not only because court decisions have clouded the matter with some uncertainty; I think this is an appropriate time for the Senate, and hopefully the Congress of the United States to go back, as it were, to what the Founding Fathers intended.

The Senator then characterized the Amendment as "a well-intentioned amendment, a good amendment, a necessary amendment, a worthwhile amendment, because it carries through the spirit of religious freedom under the Constitution of the United States" (118 *Cong. Rec.* 706).

Senator Dominick presented some factual situations in which an observant employee would face problems because of an employer's scheduling practices. Senator Randolph explained the protection afforded by the proposed Section 701(j), and Senator Dominick re-

sponded, "I think this amendment will be helpful." Senator Williams then stated that "[i]t seems to me that this codifies a very worthy general practice . . ." and noted that he and other Senators permit their own staff employees to observe their holy days "even though they are regular working days . . ." (118 *Cong. Rec.* 706). Senator Williams then raised the applicability of the First Amendment, and dismissed any Establishment claim because he felt that the Amendment merely permitted the free exercise of religion (118 *Cong. Rec.* 706).

Senator Randolph concluded consideration of the Amendment and called for a vote on the measure with the following words (118 *Cong. Rec.* 730):

Mr. President, religious liberty is a precious liberty. With this thought, Mr. President, I ask for the yeas and nays on the amendment.

Thereupon all 55 Senators present in the chamber voted in favor of the amendment. Twelve absent members indicated their support of the measure, and the remainder stated no position (118 *Cong. Rec.* 730-731). The House of Representatives subsequently adopted the Senate measure.

In light of the foregoing, four things are clear:

First, Section 701(j) grew out of a concern for equal employment opportunity, not a desire to encourage religious observance.

Second, evidence of the need for Section 701(j) to obviate harmful discrimination and permit the observant and qualified to be gainfully employed was fully before the Senate.

Third, assisting churches or religious orders was far from the minds of the Senators. Conversely, assistance to religious schools may well have been in the minds of the legislators who enacted the private-school aid laws which this Court has struck down in recent Terms.

Fourth, the Congress considered—and rejected—the argument that the law would be favoring or establishing those religions that require Sabbath-observance.

In enacting Section 701(j), Congress simply set about to foster equal employment opportunity by requiring that employees be excused from work when their religion forbade such work and no hardship could be shown to result. A statute carrying out this purpose is plainly constitutional.

(2) *Effect*—The court below properly concluded that “the primary effect of Regulation 1605 and [Section 701(j)] is to inhibit discrimination, not to advance religion.” Pet. App. 37a. A law that says to employers that they may not reject or fire a Sabbath-observer unless they can demonstrate that it is an “undue hardship” to keep him on the job is a far cry from the massive subsidy of religious schools that was found to violate the “direct and immediate effect” standard in *PEARL v. Nyquist*, 413 U.S. 756 (1973). Whereas “maintenance and repair” grants to parochial schools may “subsidize and advance the religious mission of sectarian schools” (413 U.S. at 779-790), securing a prospective employee’s right to a job irrespective of his Sabbath-observance has no such “subsidizing” or “advancing” effect. Similarly, grants given to parents as “an incentive . . . to send their children to sectarian schools” have the same “substantive impact” as funds

paid directly to the school for religious purposes. But an employee’s paycheck is entirely different from a tuition grant. His church may ultimately benefit from money he receives, but that consequence is “remote and incidental,” not “direct and immediate.” 413 U.S. at 783-784, n. 39.

Applicable to this case is not the holding of the financial-aid-to-private-school cases, but the observation made last Term in *Roemer*: “*Everson* and *Allen* put to rest any argument that the State may never act in such a way that has the incidental effect of facilitating religious activity.” *Roemer v. Board of Public Works*, No. 74-730, 44 U.S. Law Week 4939, 4942.

Nor is the effect of Section 701(j) unconstitutional on the ground that certain religions are more favored than others. In fact, *all* aspects of religious observance and practice—not merely Sabbath observance—are covered by the law, and *all* religions are treated equally. The fact that some religions may have more or different kinds of religiously-dictated observances than other religions does not invalidate a law that applies to all faiths equally.

(3) *Entanglement*—The court below properly analyzed the statute and determined that the kind of inquiry that would have to be made by governmental officials in administering the law involves a close examination of labor relations and business administration problems, and not a forbidden inquiry into religious beliefs. “For the most part, the EEOC and the courts will have to determine simply whether the employer has made a reasonable accommodation and whether an undue hardship will result. These issues will be

considered in the labor relations context and their resolution certainly does not necessitate any government entanglement with religion." Pet. App. 38a.

The nature of any governmental inquiry into religion is, in fact, the same as is required under the judicially created exemption in *Sherbert v. Verner*, 374 U.S. 398 (1963). In *Sherbert*, this Court made short shrift of the claim that feigned religious objections might be asserted (374 U.S. at 407), and we see no other ground under Section 701(j) than *bona fides* on which an employee's religious claim would require close governmental scrutiny. Indeed, the discussion at pages 34 to 36 of petitioner's brief emphasizes the *bona fides* issue almost exclusively.

Finally, petitioner's most extraordinary "entanglement" argument is its claim that resentment or grumbling among other employees is a divisive factor that forms one aspect of forbidden entanglement (Pet. Br. 37). Entanglement has, however, been defined consistently as "government involvement," not interference or hostility by private parties. Divisiveness generated by unjustified hostility over the exercise of a statutory or constitutional right cannot be the basis for defeating the right. It would be a curious rule of law that would make an employee's civil rights depend on a favorable poll of his co-workers. Moreover, any significant resentment (by no means indicated on this record) can be dealt with by employers in the same way other personnel problems are handled. Employees should be educated to respect the conscientious beliefs of their fellow-workers—just as they must learn to accept co-employees regardless of race or national origin—particularly when such respect is required

by the law of the land, and particularly when, as the statute commands, the only accommodation to religious practice required is what is "reasonable" and does not impose an "undue hardship" on the employer's business.

II

"Undue Hardship" Has Not Been Established Where The Duties Of The Employee Who Is Unavailable For Work May Be Readily Assumed By Others

Petitioner argues at substantial length that it attempted to accommodate to Mr. Cummins' religious observance, and that its accommodation was reasonable, but unsuccessful. To buttress this argument, petitioner lists nine "factors" which it views as relevant to the ultimate determination. As to each of these "factors," petitioner says, it supports petitioner's conclusion that it proved what Section 701(j) requires.

The enumerated "factors" are, we believe, relevant to some situations arising under Section 701(j) and irrelevant to others. For example, the number of "alternative avenues of accommodation" (Pet. Br. 48) is hardly important if there is one simple and straightforward means of accommodating. If, for example, a plant works on a seven-day schedule and employees may pick any six days, a Sabbath observer may easily be accommodated by his selection of Sundays. It then makes no difference whether there are other alternatives. Similarly, the availability of a "pool of fellow employees . . . to serve as substitute workers" (Pet. Br. 48-49) is not relevant at all if no substitution is required. And the same is true of the question whether replacements are sought regularly or infrequently (Pet. Br. 50).

A less elaborate approach than petitioner's, but one more geared to reaching the result intended by the policy of the statute, is to evaluate how the employer is able to conduct his operation while retaining or hiring the Sabbath-observer. In the present case, such an approach produces the result reached by the court of appeals—i.e., that accommodation would not generate undue hardship. The evidence was uniform and consistent that during the one day approximately every two weeks when Mr. Cummins was absent (overtime work being scheduled on an average of every other Saturday), supervision of the Banbury department was done by the supervisor of the adjoining department—usually Chester Webb. The operation ran so smoothly in this fashion that it took more than half-a-year for the new plant manager (who had been hired to iron out inefficiencies) even to discover that Mr. Cummins was absent on these days. Mr. Webb explained his supervisory duties by reporting that he “just went over there to make sure they were working and there wasn't nothing down, any machinery broken down or anything like that” (R. 152). The plant manager in charge until November 1970—who initially agreed to keep Mr. Cummins on—said that “it's always been kind of a set up down through the years that if the Banbury Supervisor was not there the Stock Preparation Supervisor covered both sides of it” (R. 117). His conclusion was that, notwithstanding his absences, Mr. Cummins “did a very adequate job” (R. 119).

What, then constituted the “undue hardship” that petitioner claims was proved? Since no special employee had to be hired and, in only rare instances, did a supervisor not otherwise on duty have to be assigned,

there was neither added expense nor substantial assignment of substitutes. Apparently, the sole argument is that two supervisors expressed unhappiness over the fact that they were working on Saturdays and Mr. Cummins was not.

If that argument, of its own, is to be given any weight at all, no protection can ever be afforded to a conscientious Sabbath observer. By definition, such religionists will be absent every Saturday, and if the plant is ever in operation on Saturdays, others will feel that they alone are being asked to work on that day. Yet in the regulation which was the forerunner for Section 701(j), the EEOC contemplated, as the last sentence of Section 1605.1(b) indicates, that accommodation will often require work by others “during the period of absence of the Sabbath observer.” And a parallel Civil Service regulation, adopted by the Civil Service Commission as a standard for the federal government, also contemplates reassignment of others to Saturday shifts. See 5 CFR § 713.204(g), which requires a government agency to (emphasis added):

Make reasonable accommodations to the religious needs of applicants and employees, including the needs of those who observe the Sabbath on other than Sunday, when those accommodations can be made (*by substitution of another qualified employee, by a grant of leave, a change of a tour of duty, or other means*) without undue hardship on the business of the agency. If an agency cannot accommodate an employee or applicant, it has a duty in a complaint arising under this subpart to demonstrate its inability to do so.

Moreover, on the record in this case it does not appear that the unhappiness of the other supervisors was

exclusively attributable to the uneven Saturday shifts. In the record, and in the petitioner's brief, it is asserted that other supervisors were working as much as 72 hours a week while Mr. Cummins continued to work only 40 hours a week (Pet. Br. 9). Plainly this lopsided schedule was not related to Cummins' Sabbath observance. Even if one deducts 10 hours for every Saturday worked by the others (averaging 5 hours per week in view of the once-every-second-Saturday schedule), there is still a difference of more than 25 hours per week between the scheduled assignments of Cummins and the others.

Why—as the court below noted—was Cummins not assigned to more supervisory hours during the week? One possible answer supports his appraisal of the “supervisory” duties at the Banbury department—there was not enough to do, beyond the scheduling which he fully accomplished on weekdays, to assign him to more supervisory hours at Banbury. The failure to give him more overtime hours seems particularly inexplicable in light of the unconditional statements he made in July 1970—quoted in our Statement (p. 5, *supra*)—that he would be willing to be assigned to any hours at any time, so long as he did not have to work on the Sabbath. See also R. 63, 67-68, 74, 78, 99, 115, 119, 141, 153. If Messrs. Webb and Cummins worked on average of 110 hours per week between them (of which 5 were on Saturday), it would have been a simple scheduling matter to have assigned 55 non-Saturday hours to Cummins and 50 non-Saturday hours and 5 Saturday hours to Webb. Listing Mr. Cummins as a “substitute” and expecting him to volunteer for extra work *to the supervisor whose place he*

would take cast on him the employer's burden (R. 183, 185).

Petitioner's failure to work out this equitable arrangement—or even to suggest any arrangement under which Mr. Cummins' salary might be reduced if he worked less overtime than other supervisors—bespeaks, we believe, the true motive behind Mr. Cummins' discharge. When Cummins indicated to “Dutch” Haddock that he was a religious observer, he became too much of an inconvenience for Haddock to bother with. Rather than having been treated like other supervisors and working around his conscientious disability, he had been shunted off to one side, and those who worked with him soon found this isolation unacceptable. Was it coincidental that when Mr. Saylor was plant manager, accommodation seemed reasonable and desirable, but that after Mr. Haddock, the new manager, learned of Cummins' unavailability, asserted “undue hardship” infected the operation, and Mr. Cummins could no longer be tolerated?

This Court recognized in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), that employment practices “fair in form” could be “discriminatory in operation.” 401 U.S. at 431. Nowhere is this more true than with respect to religious observances. An employer may *say* that he needs all his employees six days a week or that none may wear a skullcap or that all must eat the hot lunch provided by the company. Such rules seem even-handed, but they apply discriminatorily to those whose religious scruples would be violated by compliance.

Congress has ordered in Section 701(j) that such superficial explanations are not to be accepted at face

value. Instead, a court must make a searching examination of the true impact that reasonable accommodation would have on the business operation of an employer. The employer must demonstrate not just hardship; he must prove *undue* hardship. And the hardship may not be the inconvenience or unhappiness of his employees; it must have to do with the business necessity of his operation.

In this regard, the one year's experience while Mr. Cummins was being accommodated was most instructive. Rather than "taxing" petitioner with the fact that it accommodated, the court below used the actual experience as a barometer of how burdensome future accommodation would be. It concluded, quite properly, that it was not burdensome at all. There was no added expense,³ there was no demonstrated reduction in efficiency or output, and there was no extraordinarily untoward impact on employee relations. At worst, there was some slight inconvenience that could have been adjusted and overcome with minimal ingenuity and good will. In these circumstances, the statutory standard was not satisfied.

Nor did the court below improperly substitute its judgment for that of the district court on the question of undue hardship. The district court had before it only a dry record; it heard no witnesses and judged no credibility. Consequently, the appellate court was in equally good position to weigh the sufficiency of the justification—which was, in any event, a legal question—as the district court.

³ We do not, of course, concede that added expense constitutes "undue hardship." Indeed, we believe that some additional cost is a permissible price to pay for preserving religious freedom.

This is particularly true in light of the fact that the burden of proof rested with the employer. An *amicus* brief supporting the petitioner challenges this allocation of the burden and asks this Court to "reconsider" the burden of proof requirement because it compels the employer to prove a negative—*i.e.*, that he is unable to accommodate without undue hardship. But it is the employer who has all the information concerning business operations at his disposal, and it is he who can readily explain—if explanation is possible—why an accommodation is not feasible.

We have previously observed that the most common danger in this area of discrimination is that it is easy to verbalize a general justification for any discrimination based on unusual practices or conduct. It is, on the other hand, hard to challenge rules that appear uniform and to probe their true purpose and application. It is, therefore, essential for the effective implementation of this law to retain the burden of proof where the expert agency and the Congress have placed it—with the employer who has the fund of necessary information.

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted,

NATHAN LEWIN
2555 M Street, N.W., Suite 500
Washington, D. C. 20037

SIDNEY KWESTEL
425 Park Avenue
New York, New York 10022

DENNIS RAPPS
66 Court Street
Brooklyn, New York 11201

*Attorneys for the National Jewish
Commission on Law and Public
Affairs ("COLPA"),
Amicus Curiae*

Of Counsel:

HOWARD I. RHINE
AARON KINDERLEHRER